APPENDIX.

Being Article 3, of Chapter 22, of the Acts of the General Assembly of Kentucky, approved March 15, 1906.

1. It shall be the duty of each and every owner or claimant of land to pay all taxes which have been assessed, and which should have been assessed, against him, and those under whom he claims, as the owner or claimant of said land as of the 15th day of September, 1901, the 15th day of September, 1902, the 15th day of September, 1903, the 1st day of September, 1904, and the 1st day of September, 1905; and if the said owner or claimant, or those under whom he claims, has failed to list said land, or any part thereof, for taxation, as of said dates, or any of them, it shall be his duty to have same assessed and listed for taxation, in the manner and within the time hereinafter provided, as of each of said dates for which the assessment has been omitted, and to pay the taxes, interest and penalties thereon as herein provided.

The fact that said land has been listed for taxation, or the taxes have been paid thereon, by another claimant, shall not relieve against the duty herein imposed.

If any such owner or claimant, or those under whom he claims, has failed to list such land for assessment and taxation, as of any three of said dates, or has failed to pay the taxes charged, or which should have been charged against him, or those under whom he claims, as the owner or claimant thereof upon said dates, for any three of said years for which said assessments were, or should have been made, said owner and claimant and those under whom he claims are hereby declared to be delinquent; and such failures, or either of them, shall

because for the forfeiture and transfer to the Commonwealth of his said claim and title thereto, in a proceeding to be instituted for that purpose, as hereinafter provided. But said cause for forfeiture shall be extinguished if said owner or claimant, his heirs, representatives, or assigns, shall within the time and in the manner in this article provided, cause said land to be assessed for taxation, and, on or before March 1, 1907, pay the taxes charged, and which should have been charged against him, or against those under whom he claims, as the owner and claimant thereof, for each and all of said five years, for which he or those under whom he claims are delinquent, together with the interest and penalties provided by law in case of the redemption of land sold for the non-payment of taxes.

2. The ascertainment of the amount of taxes unpaid and the assessments required by the preceding section shall be made by the county court of the county wherein the land lies, upon the application of said owner or claimant, by a petition, verified by himself or his agent, filed in said courts on or before January 1, 1907, in which the land sought to be charged shall be described, so as to be identified, and the years for which it was not listed and the years in which the taxes were not paid shall be stated, and in which also shall be stated the grant under which he claims, if he derived title from a grant, and the instrument through which or the manner in which the title devolved upon him. Said application shall be set for hearing upon a day to be fixed by the applicant, not less than ten nor more than twenty days after the filing of the petition, of which he shall give at least ten days' written notice to the county attorney, whose duty it shall be to attend said hearing and represent the State and county; for

which service he shall receive as compensation ten per centum of the amount ultimately collected by sale or otherwise, by virtue of such delinquency.

It shall be the duty of the county court to decide upon said application in a summary manner, upon such evidence as may be offered, having due regard to the value of adjacent property as of said dates, and to ascertain the amount of unpaid taxes which the applicant and those under whom he claims should have paid for any and all of said years, whether assessments were originally made as of said dates or not. Upon finding the amount, the court shall also ascertain the proportion of such taxes due for county and State purposes at the rate fixed by law for such years; and shall cause a record of the findings to be made on the order book of the court, and certified to the Auditor of the State and county clerk. Should the court find that the land has been assessed against such owner and claimant, or those under whom he claims, as of any of said dates, it shall accept such assessment as a basis upon which to ascertain the amount of unpaid taxes for the year such assessment may have been made.

Either the petitioner or the Commonwealth, feeling aggrieved by the finding of the County Court, shall have the right to take an appeal, within thirty days after the entry of the finding of the County Court, to the Circuit Court for said county, in the manner that other appeals are taken, except that no bond shall be required of the Commonwealth.

It shall be the duty of the Circuit Court to hear and determine said application *de novo*, and to give it precedence over all other civil business in said court. The finding of the Circuit Court shall be conclusive and not subject to appeal. A copy of the findings shall be

certified to the Auditor of the State and to the Clerk of the County Court.

As soon as the time for appealing from the finding of the County Court has expired, if no appeal is taken, or as soon as the final order of the Circuit Court is entered, if an appeal is taken, the obligation of said owner or claimant to pay the taxes therein called for, with interest and penalties, as provided by law for the redemption of land sold for the non-payment of taxes, shall be complete; and the same shall be paid to the Sheriff of the county within thirty days thereafter. Provided, however, that if in a proceeding hereunder begun within the time herein allowed, the amount payable by the delinquent shall not be finally determined until within less than thirty days before March 1st, 1907, or until after said date, then the right of forfeiture as set out in Section 1 of this article shall not be complete in the Commonwealth, unless and until said delinquent shall have failed to pay said amount, interest and penalties, for thirty days after the entry of said order.

Upon collecting said taxes, interest and penalties, the Sheriff shall, after paying the costs of the proceedings and retaining the commission allowed by law for himself, pay over and account for the remainder to the Auditor of the State and to the county, in the same manner and subject to the same responsibilities of himself and his bondsmen as in the case of other taxes collected by him. Out of the amount so paid, there shall be paid to the county attorney ten per centum thereof and an additional ten per centum to the Commonwealth's attorney, should an appeal have to be prosecuted to the Circuit Court.

3. If any such owner or claimant shall fail to have said land assessed, or fail to pay the taxes charged, or

which should have been charged against him, or those under whom he claims, as the owner or claimant of any such tract of land, as provided and within the time prescribed in Sections 1 and 2 of this article, together with the penalties and interest as provided by law, then it shall be the duty of the Commonwealth's attorney to institute in the Circuit Court of the county in which said land or any part thereof lies, a proceeding in equity, in the name of the Commonwealth of Kentucky as plaintiff against said tract of land, and the owners or claimants of said land as defendants, naming them if their names are known to him, and if their names are unknown to him, designating them as the unknown owners and claimants thereof, for the purpose of declaring the title or claim of said defendants forfeited to this Commonwealth, and selling same. The suit so instituted shall be proceeded with to final judgment in all respects as other equity causes so far as applicable.

In addition to the requirements of the Civil Code of Practice respecting process and service thereof, notice shall be given of the pendency of said action by posting a copy of the petition at the front door of the court house which shall be done by the Clerk immediately after the petition is filed, and he shall show by endorsement upon the original petition the time at which said copy was posted. The defendants shall not be required to answer until after the expiration of thirty days from the posting of said copy. And such copy, when so posted, shall be deemed notice to all defendants of the pendency of said action and its object.

The petition of the plaintiff shall allege the facts constituting the cause of the forfeiture under the provisions of this article, and there shall be filed with it a copy of the grant or instrument upon which the title

or claim sought to be forfeited is based; and no other title, claim or possession or continuity thereof, whether owned or claimed by the defendant or by others, shall be forfeited or in any manner affected by said proceeding. The prayer shall be for a judgment of forfeiture and sale of the title or claim in the petition described.

The court shall render judgment in accordance with the pleadings, exhibits and evidence adduced; and if it shall find that said title or claim sought to be forfeited is or has been subject to forfeiture under the provisions of this article, it shall render judgment declaring the same forfeited and the title thereto vested in the Commonwealth. Such judgment shall operate as a transfer to, and vesting in, the Commonwealth of the said title and claim of each and all the defendants, and those under whom they claim, without execution of deed or other instrument. If the court shall find that the same is not subject to forfeiture under the provisions of this article, then it shall so adjudge and dismiss the petition of plaintiff.

Judgments rendered by the Circuit Court under this article shall be conclusive as against all defendants, including infants, lunatics and married women, as to their title or claim derived through or under the grant, title or claim described in the petition, and said judgments and the proceedings upon which they are based shall not be subject to the provisions of Sections 391, 410, 414 or 574 of the Civil Code of Practice. Issues as to whether or not the title and claim sought to be forfeited is or has been subject to forfeiture under the provisions of this article, shall be triable by jury; and the judgment of the court shall be in accordance with the verdict, as in ordinary actions.

Either party may prosecute an appeal from such judgment to the Court of Appeals within thirty days after same may be entered; but if any such appeal be prosecuted, the transcript of the record shall be filed in the Court of Appeals within sixty days after the entry of said judgment; and the hearings upon appeal shall have the same precedence as other Commonwealth cases. No bond on appeal shall be required of the Commonwealth.

4. If, before or during the term of the Circuit Court next succeeding the term at which a judgment of forfeiture may have been entered, as authorized by Section 3 of this article any of the said defendants, in privity with the title so forfeited to, and vested in the Commonwealth, file his counterclaim in said action, accompanied by a bond, with good and sufficient resident personal security, to be approved by the court, if in session, otherwise by the clerk of the court, conditioned to pay, and in all respects abide by and perform, the judgment that the court may enter upon such counterclaim, and in said counterclaim offer to purchase back from the Commonwealth the title and claim in said section so forfeited to, and vested in, the Commonwealth, and praying to be allowed so to do, and exhibiting title thereto in himself, it shall be the duty of the court, upon proper pleadings as in other equity cases, and upon such evidence as may be adduced in the manner authorized by law, to ascertain and adjudge the amount of unpaid taxes, charged, and that ought to have been charged against the defendant and those under whom he claims, as the owner or claimant of said land, for the fifty years immediately preceding the filing of such counterclaim, and if the court finds and adjudges that said defendant is the owner of the title so forfeited to and vested in the Commonwealth, to

enter a judgment against such defendant for a sum equal to the amount of the unpaid taxes charged, and that ought to have been charged, against said defendant and those under whom he claims as the owner and claimant of said land, for said fifty years, together with interest thereupon at the rate of 15 per cent per annum from the time of the said unpaid taxes for said several years were due, and the costs of the proceedings, including a reasonable attorney fee for the Commonwealth's Attorney, to be fixed by the court. Provided, that no person herein provided, shall be allowed to purchase back from the Commonwealth the title so forfeited to, and vested in it, except such defendant as may, but for such forfeiture, establish in such proceeding a title thereto in himself upon which he could maintain an action in ejectment.

If, thereupon, such defendant shall pay to the sheriff the amount of such judgment, it shall be the duty of the court to enter a judgment re-transfering to such defendant the title and claim so forfeited to, and vested in, the Commonwealth; and said judgment shall have the effect of re-transferring and vesting same in said defendant without the execution of a deed or other instrument.

Should such defendant not thereupon pay said judgment the court shall thereupon enter an order directing the sale of the said title and claim as in Section 7 of this article provided, and the amount realized upon said sale shall be used in the payment of costs and commissions hereunder; and the remainder, if any, shall be paid to the State and county as provided in this article, and the counterclaim shall be dismissed. If the sale does not produce enough to pay the costs, an action may thereupon be maintained upon said bond for the costs, and reasonable attorney's fee for the Commonwealth and County Attorney, to be fixed by the court.

If, at any time during the pendency of said action, it shall be made to appear that the bond theretofore tendered and approved by the court or the clerk is insufficient, additional security shall be required, and the failure to execute same upon being so required shall have the same effect as if no bond had been given originally, and the counterclaim shall be dismissed.

Appeal may be prosecuted to the Court of Appeals from the Circuit Court under this section within the time and in the manner, and subject to all the conditions provided for appeals in Section 3 of this article, except that the judgment of the Circuit Court as to the amount thereof shall be final and not subject to appeal.

All amounts paid to the sheriff under this section shall be by him received and paid out to the persons entitled to the same as costs, and the remainder to the Auditor of the State and to the county in proportion to the amount due them for taxes and penalties for the said fifty years, in the same manner and subject to the same responsibilities of himself and his bondsmen as in the case of taxes collected by him. Provided, that fees required by law to be paid to the Auditor shall be paid to him by the sheriff, and by the Auditor paid to the person entitled thereto. It shall be the duty of the county attorney to assist the Commonwealth's Attorney in all proceedings under this article for which he shall be allowed the per centum as herein provided. Certified copies of the judgments of the Circuit Court, under Sections 3 and 4 hereof, shall be recorded in the deed books of the county where the land, or any part thereof, lies, and indexed as deeds are required to be indexed.

5. Any owner or claimant who instituted a proceeding allowed by Section 2 of this article, and who did not, within the time herein limited, pay the amount therein

ascertained as charged or chargeable against him and those under whom he claims, as the owner or claimant of said land, shall not be allowed the right to purchase back, under the proceedings authorized by Section 4 of this article, such title or claim so forfeited to, and vested in, the Commonwealth.

6. All title and claim proceeded against under this article and forfeited to, and vested in the Commonwealth and not purchased back by the owner or claimant thereof, as authorized by Section 4 hereof, whether such forfeiture be for past delinquencies or for future delinquencies as authorized under Section 10 hereof, shall be, and is hereby, transferred to, and vested in, any person for so much thereof as such person, or those under whom he claims, has had the actual adverse possession for five years next preceding the judgment of forfeiture, under claim, or color of title, derived from any source whatsoever, and who, or those under whom he claims shall have paid taxes thereupon for the five years in which such possession may have been held or may be held; and in those in privity with such person, his heirs, representatives or assigns, as to the mineral or other interests or rights in or appurtenant to such land.

7. All title and claim to land transferred to, and vested in, the Commonwealth under the provisions of this article and not purchased back by the owner or claimant, as provided by Section 4, and not vested in the occupant, as provided by Section 6, shall be sold to the highest and best bidder for cash in hand. Said sale shall be made pursuant to a judgment of the circuit court in said action, and shall be at public auction at the front door of the court house on the first day of some regular term of the circuit or county court, after notice of sale shall have been advertised in the manner required by law in the

case of the sales of land under execution. The Commissioner shall report the sale to the court for its confirmation, and, when confirmed, the court shall order the Commissioner to make a deed to the purchaser. Such deed shall operate to transfer to said purchaser such title and claim to the land so forfeited and transferred to, and vested in, the Commonwealth as remains in it after the operation of Section 6 of this article, and shall so recite.

The money realized from said sale shall be paid out and distributed as follows: First, to the payment of the costs of the suit, including Commissioner's fee as fixed by law and a reasonable attorney's fee, to be fixed by the court and paid in the manner provided by law; second, to the county and State the proportion to which each may be entitled, together with interest and penalty, as in this article provided; third, the remainder shall be paid over to the former owner or claimant or his personal representatives or assigns.

8. No action to enforce a forfeiture as authorized and provided in this article shall be instituted after the expiration of five years from the accrual of the right thereto.

9. No owner or claimant of any land in this Commonwealth shall be allowed to prevent the operation of this article by the payment, after January 1, 1906, of any amount less than the whole of the unpaid taxes, interest and penalties provided by law, that were charged, and that should have been charged, against said owner or claimant of said land and those under whom he claims, as of each and all of said five dates, first mentioned in Section 1 hereof; and where such payment is made after the passage of this act, the amount to be paid shall be ascertained and payment made, as in this article provided.

10. When, for any five successive years after the first

day of August, 1906, any owner or claimant of or to any land in this Commonwealth shall fail to list same for taxation and cause himself to be charged with the taxes chargeable thereon, or fail to pay the same as provided by law, then such failure shall be cause for the forfeiture of his title and claim thereto, and the transfer of the same to, and vesting it in, the Commonwealth of Kentucky. And wherever such failure exists, it shall be the duty of the Commonwealth's attorney to institute an equitable action in the circuit court of the county wherein the said land, or a part thereof, lies, for the purpose of declaring said forfeiture and vesting said title and claim thereto in the Commonwealth of Kentucky, and for the sale of such parts thereof as, under the provisions of this article, are liable to sale. Such actions and proceedings pertaining thereto shall conform to the provisions of this article as far as same may be applicable.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

Supreme Court of the United States.

1

EASTERN KENTUCKY COAL LANDS CORPORATION,
Plaintiff in Error,

vs.

COMMONWEALTH OF KENTUCKY,
Defendant in Error.

No. [illegible] 47

SAME

vs.

SAME.

No. [illegible] 48

2

The Defendant in Error, the Commonwealth of Kentucky, will take notice that on Tuesday, April 5th, 1910, in the Court-room of the Supreme Court of the United States, in Washington, D. C., at motion hour, or as soon thereafter as Counsel can be heard, the Plaintiff in Error will move the Court to advance these two cases, numbers 223 and 224, to be heard immediately following the close of argument in case No. 193 of the Kentucky Union Company against the Commonwealth, all three of said cases now pending for argument on the docket of said Court.

3

SAMUEL HOWLAND HOPPIN,
EUGENE M. BERARD,
WM. JACKSON HENDRICK,
Counsel for Plaintiff in Error.

Service of this notice is hereby accepted this 23rd day of March, 1910.

JAS. BREATHITT,
Attorney General of Kentucky.

4 **MOTION AND GROUNDS TO ADVANCE.**

Comes the Plaintiff in Error, Eastern Kentucky Coal Lands Corporation, by Counsel, and moves the Court to advance these two cases, Nos. 223 and 224, to be heard immediately after argument in case No. 193 of the Kentucky Union Company *v.* the Commonwealth of Kentucky.

SAMUEL HOWLAND HOPPIN,
EUGENE M. BERARD,
WM. JACKSON HENDRICK,
of Counsel for Plaintiff in Error.

The grounds on which this motion is made may be thus stated:

5 It is highly improbable that the Court will be able to hear any cases at the present term beyond number two hundred.

The Kentucky Union Case No 193 and these two Cases, Nos. 223 and 224, are each and all of them Writs of Error from the Kentucky Court of Appeals challenging the Constitutional soundness of Article III of an Act of the Legislature of Kentucky approved March 15th, 1906.

That is the contention common to each of the three cases, 193, 223 and 224.

Counsel for Defendant in Error under date of March 25th, 1910, write that they "have no objection to the cases being so advanced, neither would we object to the Supreme Court * * * ordering all three of the cases

6 to be heard together."

Counsel for Eastern Kentucky Coal Lands Corporation, Nos. 223 and 224, sought the consent of Counsel for Kentucky Union Company, No. 193, to unite in a motion to advance cases 223 and 224 to be heard with 193.

This consent the Counsel for Kentucky Union Company declined to give.

Counsel for Eastern Kentucky Coal Lands Corporation, the Plaintiff in Error in 223 and 224, in contemplation of the probability that the Court would reach these cases 223 and 224 within ten days after hearing 193 and before rendering opinion in the latter case, were content to await their turn on the docket. But as it now develops that if

the regular call is followed 193 may be heard and deter- 7
mined at this term and 223 and 224 go over to October Term next, Counsel for Plaintiff in Error in 223 and 224, deem it their duty no less to their client than to the Court to make this motion.

The pressing necessity therefor will appear from the following considerations:

The Plaintiff in Error in 193 relies solely upon the contention that Article III of the Act of March 15th, 1906, is void because it is an *ex post facto* Act.

In its petition for rehearing in the Kentucky Court of Appeals the Plaintiff in Error in 193 says (page 24 of record in 193):

> "We presented as our only contention against the validity of Article III of the Revenue Law of 8
> 1906 that it violates the *ex post facto* prohibition in Clause 1 of Section 10 of Article 1 of the Constitution of the United States. We prayed for a reversal of the Leslie Circuit Court upon that ground alone, and we expressly waived both in brief and in argument the right to have the case reversed upon any other ground. We, furthermore, expressly prayed in our brief on appeal (page 38) that if this court should affirm the judgment of forfeiture it would "show by its opinion that the law is not in violation of the Constitution of the United States." In view of the emphasis which we placed upon this request it was with great surprise that we found that the opinion of this court contains no mention whatever of the fact that the question of *ex post facto* raised by our appeal is a Federal question. This omission was surely due to 9
> an oversight, for it is the policy of this court, and all other State courts, to promote the fullest hearing of any question raised under our Federal Constitution. We now come again to this court and earnestly ask that it will allow the record in this case to show that a Federal question was raised, so that our client may take a writ of error to the Supreme Court of the United States."

And the Court of Appeals, in overruling its petition for rehearing, says (page 31 of Record in 193):

> "As the appellant is under no disability, does not claim under a grant from the State of Virginia,

and did not seek to list its property, or offer to pay the taxes for the years 1902, 1903, 1904, 1905, and 1906, either with or without interest and penalties, we hesitated in the opinion to pass specifically upon these questions raised by it. However, out of the consideration entertained for the eminent counsel presenting them, we have expressed our views upon these points, in order that he may have the benefit of specific adjudication thereon."

But the Plaintiff in Error in 223 and 224 *does claim under grants from the State of Virginia, did seek to list its property, and did offer to pay the taxes for the years 1901, 1902, 1903, 1904 and 1905.* (See Record in 223 where at page 35 it offered to pay on 88,415 acres in Floyd County: at page 32 on 20,058 3/4 acres in Knott County: at page 17 on 55,020 acres in Letcher County: at page 69 on 275,236 acres in Pike County, at the rate of $1.00 per acre.)

In addition to all this, the Plaintiff in Error in 223 and 224 are prepared to show, in addition to the *ex post facto* feature of this Article III.

I. That Article III stands repealed on the face of the Act by a subsequent article of the same Act.

II. That Article III is in letter and spirit a violation of the compact between Virginia and Kentucky of December 18th, 1789.

III. That Article III violates the provisions of the Constitution of Kentucky and the Constitution of the United States requiring due process of law.

IV. That Article III violates Section 10 of Article I of the Constitution of the United States prohibiting any State from passing any law impairing the obligation of contracts.

V. That Article III violates the XIV amendment of the constitution forbidding any State to deprive any person of property without due process of law or deny to any person within its jurisdiction the equal protection of the law.

VI. That Article III is an Act of spoliation and lawless confiscation and is revolutionary and subversive of all constitutional and orderly government. 13

VII. That notwithstanding all, the Plaintiff in Error, disregarding its flagrant violations of constitutional inhibitions has complied with Article III so far as it is applicable to Plaintiff in Error.

To the end, therefore, that the Court may hear *consecutively all these cases at the same time*, fraught as they are with consequences so momentous to large interests and to a large number of parties in interest, the motion to advance is presented, in the hope that the Court may see its way clear to grant it, as well for the ends of justice as to expedite the business of the Court. 14

SAMUEL HOWLAND HOPPIN,
EUGENE M. BERARD,
WM. JACKSON HENDRICK,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1909.

47048

Nos. 22[illegible]-224.

Office Supreme Court U.
FILED
APR 20 1910
JAMES H. McKENNEY,
Clerk

EASTERN KENTUCKY COAL LANDS CORPORATION,
Plaintiff in Error,

vs.

THE COMMONWEALTH OF KENTUCKY,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

"TO LAY WITH ONE HAND THE POWER OF THE GOVERNMENT ON THE PROPERTY OF THE CITIZEN, AND WITH THE OTHER TO BESTOW IT UPON FAVORED INDIVIDUALS . . . IS NONE THE LESS A ROBBERY BECAUSE IT IS DONE UNDER THE FORMS OF LAW AND IS CALLED TAXATION. THIS IS NOT LEGISLATION. IT IS A DECREE UNDER LEGISLATIVE FORMS."

MR. JUSTICE MILLER,
LOAN ASSOCIATION VS. TOPEKA, 20 Wall. 655.

SAMUEL HOWLAND HOPPIN,
EUGENE M. BERARD,
JAMES H. HAZELRIGG,
WM. JACKSON HENDRICK,
Of Counsel for Plaintiff in Error.

INDEX.

PAGES

STATEMENT 1

ARGUMENT.

I. Ex Post Facto law 74
II. Violates Compact 96
III. Impairs Obligation of Contracts 176
IV. Not Due Process and Denies Equal Protection 189
V. Conclusion 289

Statement

The judgments and proceedings under review and the dependence of those of No. 224 on those of No. 223 and of both on Article III of the Ky. Revenue Act of 1906

Earlier judgment, Dec. 20, 1907, affirming dismissals of petitions to list the lands of plaintiff in error (Record No. 223).. 1

Later judgment, June 20, 1908, affirming judgment purporting to declare forfeiture of title of plaintiff in error (Record No.224) 1

Part of the Record in No. 223 is an exhibit in No. 224, and all of the record in No. 223 is referred to by the Court of Appeals in No. 224 1

Article III of the Ky. Revenue Act of 1906

—went into effect 90 days after adjournment of legislature 2

—is an Article of 10 Sections in an Act "Relating to Revenue and Taxation," containing 19 Articles and 318 Sections, the sections, other than the 10 of Article III, being mainly re-enactments of the prior law of Revenue and Taxation 2

—is the same Article that was recently before this Court in Case No. 193, but the cases now at bar involve many more matters for determination 2

—not only violates the National Constitution in many other respects but is also inconsistent with other Articles of the same Act which show a denial of due process and equal protection of the laws and show the sinister influences that instigated it 3

Section 1—is *ex post facto* in three different ways, denies due process and equal protection 4

—impairs both the obligation of the original grants of the land by Virginia and of the Virginia-Kentucky Compact of 1789 by which Kentucky covenanted to hold them "valid and secure" 5

—contains a provision that "the fact that said land has been listed for taxation or the taxes have been paid thereon by another claimant shall not relieve against the

PAGES

duty herein imposed" which did not exist in any prior statutes of Kentucky (although the Court of Appeals has otherwise stated), and does not exist anywhere else in the Act of 1906 5

—requires *ex post facto* an owner to list for and pay again taxes paid which he is already bound to pay to those who have been subrogated to the claim of the state 6

—declares a purchaser to be delinquent for non listing of the lands before he bought 6

—makes such delinquency of others a cause of forfeiture of his title, which cause must be "extinguished" 9

—imposes *ex post facto* payment of new penalties as a condition of such "extinguishment" 10

—is erroneously claimed to have precedent in West Va. law 11

Section 2—requires the "cause" to be "extinguished" before Jany. 2, 1907, and is inconsistent with other Articles of the same Act 12

Section 3—abdicates and repudiates the office of paramount protector of infants, married women and insane, and thereby denies to them if owners of these lands the equal protection granted to others 13

Section 4—limits time to "purchase back" to next term of lower Court, requires as conditions proof of title and payment of arrears of taxes for 50 years 14

Section 5—further restricts right to "purchase back" by excluding one who has listed but failed to pay 15

Section 6—provides that title forfeited and not purchased back "*is hereby* transferred to and vested in" occupants "under *claim* or color of title derived from any source *whatever*" and "those in privity . . . *as to the mineral or other interests*," which the Attorney-General has shown to be unconstitutional as inconsistent with the general provisions of the same Act, Special Legislation and denial of the equal protection of the law of fifteen years' limitation 16

Section 7—contains a deceptive and delusive provision for sale of anything that does not go to the adverse occupants 17

Section 8—limits action to enforce forfeiture to five years after accrual of so-called right thereto 18

Section 9—prevents escape from "cause" of forfeiture of those who have paid taxes prior to this enactment if not prior to January 1, 1906, contrary to the general law; is both penal and retroactive and denies due process and equal protection of the laws 18

Section 10—discriminates against those in arrears at the time of enactment by requiring five successive years of future delinquency, instead of three out of five years of past delinquency, as a "cause" of forfeiture, and omits the statement

PAGES

that payment of taxes on the same land by another claimant shall not excuse the so-called delinquency as provided in Section 1 relating to past so-called "delinquencies"..... 19

The instigators of the enactment of Article III
—private persons and corporations who had paid from 50 cents to $5 per acre for claims under alleged adverse possession..... 20
—their object to vest in themselves as in privity with the occupants the title which Article III says "is hereby transferred"..... 21
—*their pretended purpose* "to raise revenue"..... 21
—*their real purpose* "to outlaw" titles..... 22
—*the attempted excuses for their purpose*—as stated by the Court of Appeals..... 22
The plaintiff in error—incorporated in Virginia, Feb'y 7, 1906.
—its object to produce a marketable title for purposes of developing the lands by acquiring the legal title under the Virginia patents as a preliminary to settling with occupants and merging all valid conflicting claims under one ownership..... 23
—its agreement of Feb'y 8, 1906 (prior to the enactment of Article III) to purchase titles under the ancient patents... 24
—the deeds to the plaintiff in error made in December, 1906, pursuant to the Agreement of Feb'y 8, 1906..... 24
—its method the usual method of settling titles to similar wild lands..... 25

Case 223—The Attempt of Plaintiff in Error to Comply with Article III by listing the lands.

Reasons for the attempt although then advised that Article III was unconstitutional—fear of the hostility of the officials of Kentucky and the cloud that would be cast on the title. 26
—the filing of the petitions as Court of Appeals says was in "claiming to comply with the provisions of the Act and at the same time attacking its constitutionality"..... 27
The petitions to list—are all in the same form, and state the number of acres, date and county of survey, date and places of record of patent, and the full description by metes and bounds and by what other tract or county line each tract is bounded so that a plat of all could be easily made..... 27
—the filing of the petitions was not a waiver of the objection that the act was unconstitutional..... 29
—the Court below admits that the petitions were "sufficiently explicit to have located the several boundaries".. 30

PAGES

—the disclaimer of title to improvements and to the parts of the surface owned by others by adverse possession was required by truth, justice and the Statutes of Kentucky and decisions of its Courts..... 30

—the allegation of payment of taxes by occupants who had been thereby subrogated to the State's claim against the owner was to enable the Court to relieve the petitioner... 31

The opposition of the County Officers—the attorney for Letcher County files an answer as in an ejectment suit..... 31

—all the County attorneys opposed the attempt to list and pay taxes, although it was their duty to assist in increasing the revenues of the County and State..... 31

The hearing of the Petitions in the County and Circuit Courts

—an armed and excited crowd present in the Court room of the County Court..... 33

The offer of the plaintiff in error to pay taxes on over 400,000 acres a tax of over $40,000 and an amount which was more than the annual tax of the four Counties although much of the land in these Counties was not owned or claimed by plaintiff in error..... 34

The Judgment of the County Courts dismissing these petitions and refusing the offer to pay taxes *stated no reasons* and was *contrary to the Article making it the duty of the County Court to assess the amount due*..... 34

The singularly similar formula of dismissal in all the Circuit Courts "that said petition and application is insufficient in that it does not comply with the mandatory provisions of said Article and *for other good and sufficient* reasons" without stating the mandatory provisions or the reasons.. 35

The hearing of the appeals in the Court of Appeals of Case No. 223..... 35

—appearance in opposition by the attorneys of the instigators of Article III who state that one of the questions to be determined is whether the article is a violation of the National Constitution..... 36

—the Attorney General declares his Opinion that Article III is unconstitutional..... 36

The Opinion of the Court of Appeals in Case No. 223 sustaining the Constitutionality of Article III and affirming the denial of the petitions to list and *the petition for rehearing.* The Opinion was delivered Dec. 20, 1907..... 36

—was required by Kentucky Statutes to be in writing and to be recorded, and is part of the record for all purposes.. 36

—contains the text of Article III (Record 223, fol. 139–151) and is divisible into three parts..... 37

PAGES

(A) *The grounds of the judicial divination of the legislative intention* to "outlaw" these titles (*Id.* fols. 151–166)... 37

— (1) the complexities and defects of the land laws (*Id.* fol. 151, answered fol. 198)..... 38

— (2) the Court's surmise that the separation of Kentucky may have been delayed by the patentees (*Id.* fol. 159, answered fol. 199)..... 38

— (3) the Court's Opinion that the patents were for too large tracts of land (*Id.* fols.153, 156, answered fol. 200)..... 38

— (4) the Court's Opinion that the patentee paid a "mere pittance" for the lands (*Id.* fol. 158, answered fols. 202–203)..... 38

— (5) the failure of legislatures to provide for transcribing the records on formation of new Counties (*Id.* fol. 156, answered fol. 203)..... 38

— (6) the finding by the Court of a "moral" right in adverse occupants against the admitted legal right of the true owners (*Id.* fol. 158, answered fols. 204–205). 38

— (7) the Court's conclusion that the occupants are "innocent enough" (*Id.* fol. 157, answered fols. 206–213).. 39

— (8) the Court's condemnation of the true owners for failure to "develop, clear, tenant or work the lands (*Id.* fol. 158, answered fols. 213–220)..... 39

— (9) the Court's condemnation of the true owners for an alleged failure "to add to the State's strength and stability in peace and war" (*Id.* fol. 158, answered fols. 219–221)..... 39

—(10) and (11) the Court's condemnation of the true owner's for alleged failure to "answer to the imperative command of the law," *i. e.*, to pay taxes (*Id.* fol. 158, answered fols. 220–221)..... 40

—(12) the Court's statement of alleged similar conditions in Virginia and West Virginia and alleged success of confiscation there (*Id.* fols. 163–165, answered fols. 223–232)..... 40

The further plea in the petition for rehearing that none of these alleged faults were of the plaintiff in error, a subsequent purchaser (*Id.* fols. 232–258)..... 40

(B) *The arguments with which the Opinion overrules the objections that Article III is unconstitutional* (*Id.* fols. 169–189) 40

—after deciding that the question of constitutionality must be determined because if Article III is unconstitutional the plaintiff in error would be entitled to list its property under other provisions of the same Act..... 41

The overruling of the objections

—(1) to the violation of the Virginia Compact (*Id.* fols. 175–180, answered fols. 261–262, and more fully p. 96, *infra*)..... 41

PAGES

—(2) to attempt to forfeit for failure to pay an unlawful duplicate tax (*Id.* fols. 160–184, answered fols. 262–272 and more fully p. 227, *infra*)..... 41
—(3) to the denial of due process and equal protection of laws (*Id.* 184–187, answered fols. 272–279 and more fully p. 189, *infra*)..... 41
—(4) to the *ex-post facto* provisions of Article III (*Id.*, fol. 187, answered fol. 279–284, and more fully p. 74, *infra*)..... 41
—(5) as an act of spoliation and revolutionary and subversive confiscation (*Id.*, fols. 324, 188–189, answered fol. 295, and more fully, p. 308, *infra*)..... 42

(C) *The grounds of dismissal of the petitions to list* (Record, No. 223, fols. 189–193).
The Court's enumeration of alleged defects of the petitions (*Id.*, fols. 190–191), answered in the petition for rehearing (*Id.*, fols. 306–307)..... 42
The rulings of the Court in dismissing the petitions to list denies due process and equal protection of the laws, in that it
—(1) *Injects into the petitions a statement that is not there.* 43
—(2) *adds to Article* III *a requirement that is not there*... 44
—(3) applies *ex-post facto* a new rule..... 44
—(4) *Contradicts or overrules the Court's prior decisions or opinions and of other provisions of Article III and other Statutes of Kentucky* re-enacted by other articles of the same act..... 45
—(5) *Requires under pain of forfeiture that plaintiff in error should have made under oath a claim contrary to truth and justice and against the Statutes of Kentucky and prior decisions of that Court*..... 47
—(6) *Discriminates unlawfully against plaintiff in error* in favor of a co-defendant as well as in favor of others not parties to the proceeding..... 52
—*the Court ignores the murderous threats of outlaws* that would probably have made a survey impossible without bloodshed..... 56
—*The Court's assurance* that its objections are not "merely technical interposed to defeat the listing of the lands"—not sustained by the facts..... 59
—*the plaintiff in error was given no opportunity to amend*, and the Court was enforcing an Act it esteemed as "highly politic"..... 59

PAGES

Case 224—The Attempt of the Instigators of Article III to Forfeit the Title of Plaintiff in Error.

Begun June 3, 1907, in Pike Circuit Court by the attorney for the judicial district, six months before the Court of Appeals had dismissed the petitions to list..... 60
—justifies the forebodings of sinister influences..... 60
—describes the lands less definitely than did the petitions to list that the Court held described insufficiently..... 60
—unseemly and untrue allegations, some contradicted by other parts of the petition to forfeit, others contradicted by the Commonwealth's own witnesses..... 61
Demurrer of plaintiff in error overruled..... 61
Motions of plaintiff in error to strike out allegations of petition to forfeit as to failure to list, etc., prior to year 1901—granted..... 62

Answer and cross-petition of plaintiff in error
—denies material allegations of petition to forfeit..... 62
—makes a part of this answer in Case 224 the proceedings in the Pike County and Circuit Courts in Case 223..... 62
—sets up that Article III was enacted at the behest of designated Instigators of Article III who wanted plaintiff in error's title, and sought to array all local interests against it, and by threats and menaces to terrorize its counsel, and gathered armed crowds at the Court House on the hearing of the petitions to list to intimidate the attorneys of plaintiff in error and to influence the Court.. 62
—alleges that the refusal of the County Court to assess the lands listed by plaintiff in error in Case No. 223 was a denial of equal protection of the laws, and impaired the obligation of contracts and violated the Compact between Virginia and Kentucky and the Constitution of Kentucky and the Constitution of the United States, and prayed that said designated instigators of Article III be made parties to the action as the real "party in interest"..... 62
—demurrer to cross-petition sustained and all allegations of Answer stricken out by Court on motion of instigators of Article III, except denials of allegations of petition to forfeit..... 62
Amended Answer of plaintiff in error,
—verified in the month preceding the trial term and before the cause was set down for hearing and offered to the Court before the trial..... 63
—sets forth
—(a) that during all the years 1901 to 1905 and for many years prior thereto and ever since, plaintiff in error and those from whom it derives title have been prevented from entering upon the lands by fear of bodily harm and death threatened by some of the occupants 63

PAGES

—(b) that taxes on all or almost all the lands for the years 1901 to 1905 had been assessed thereon and prior to the enactment of Article III paid by occupants of part thereof..... 63

—(c) that during all the years 1901 to 1905, and for many years prior thereto and ever since, by the laws of Kentucky each occupant immediately on such payment became subrogated to the Commonwealth's claim and lien on the land against the true owner, and hence no taxes are due or can be charged thereon against plaintiff in error or those under whom it claims title..... 64

—(d) that the provisions of Article III violate the various Sections, Articles and Amendments of the National Constitution there named, the objections being *stated verbatim as they afterward appeared in the specification of errors in the record now before this Court*, and that plaintiff in error relied upon each of said Sections, Articles and Amendments as defences..... 64

—the trial Court's refusal to permit the filing was contrary to the practice of the Court and of the earlier and later decisions of the Court of Appeals and was a denial of due process and equal protection of the laws..... 65

The Trial and Judgment of "Forfeiture" in the Pike Circuit Court in Case No. 224.

Depositions for the Commonwealth

—were taken in the month preceding the trial..... 68

—all the witnesses were examined, not by the Attorney for the Commonwealth, but by one of the instigators of Article III who was counsel for others of them..... 68

—on cross-examination the witnesses contradicted some of the irrelevant allegations of the petition of the Commonwealth's Attorney as to non-listing for taxes prior to 1901. 69

—and also against the objection of counsel acting in the name of the Commonwealth testified that taxes on all or almost all these lands for the years 1901 to 1905 had been paid, and as a rule by occupants of parts of these lands.. 69

—but the Court sustained exceptions to these depositions except in so far as related to listing or failing to list for and payment of taxes of years 1901 to 1905..... 69

—defences in the original answer having been stricken out and its Amended Answer having been refused, Plaintiff in error offered no evidence except the record of proceedings in Pike County and Circuit Court on proceedings to list now before this Court as part of Record No. 223..... 69

The verdict—was after refusal of the Court to permit the proceedings in case No. 223 to be read to the jury..... 69

PAGES

—and under instructions from the Court which made the verdict a foregone conclusion 69
Judgment of the Circuit Court declaring forfeiture having been entered, plaintiff in error appealed to the Court of Appeals 69

The hearing in the Court of Appeals of Case No. 224—on appeal from the judgment of forfeiture 69
—again Counsel employed by the Instigators of Article III appear and are heard on behalf of forfeiture 70
—again the Attorney General declares to the Court his opinion that Article III is unconstitutional 70
—again Counsel for plaintiff in error plead that this Article is unconstitutional, and also plead that the proceedings thereunder are so irrespective of the unconstitutionality of the Act, and that the Amended Answer should have been received by the trial Court 70

The Opinion of the Court of Appeals in Case No. 224, affirming the judgment of attempted forfeiture 70
—is marked "Not to be reported" 70
—but like the Opinion in Case No 223 is part of the Record for all purposes 70
—reviews a part of the proceedings below and states that the Record in Case No. 223, filed with the answer in this Case No. 224, shows that plaintiff in error filed its petition claiming to comply with the provisions of Article III "while denying its Constitutionality" 70
—but does not mention the defence that Article III was instigated by private persons and corporations, nor the allegations of the gathering of armed crowds at the Court house; nor that plaintiff in error was not an owner until after the latest of the dates of alleged delinquency prior to the act; nor that it and its grantors had been for many years prevented by threats of violence and death from entering on the lands; nor that taxes on these lands had been paid by occupants who had thereby become subrogated to the State's lien and claim; nor the fact of the refusal of the lower Court to file the amended Answer and the contention that this refusal was a denial of due process of law 70
—but states that neither patentees nor any in privity with them had paid taxes since 1825; a statement for which there was no evidence before the Court and which if untrue the plaintiff in error would have been prevented from disproving by the rulings of the trial Court 71
—overrules specifically each of the objections that Article III violates designated clauses and Articles of the National Constitution 72

PAGES

—denies equal protection of the law by discriminating unlawfully against plaintiff in error in favor of a co-defendant 72

The assignments of Error reiterate verbatim the objections made in the Amended Answer offered to the trial Court and the Brief filed with the Court of Appeals on the hearing 73

Argument.

I.—Article III void as an ex post facto law.

(1) *As against all owners of land affected.* 74

—it has been already condemned by the decisions of the Supreme Court of the United States here cited ... 75

—and of the same Court of Appeals 79

—and of the Courts of the other States 83

—(a) Because it seeks to make a delinquency prior to the act a "cause" of forfeiture when it was not a "cause" prior to the enactment 85

—(b) Because it seeks to forfeit the true owner's title for failure to pay again taxes that had been already paid by others who, by express provision of the Statutes of Kentucky, have been subrogated to the State's claim and lien therefor and the State's claim against the true owner thereby discharged 86

—(c) Because it seeks to forfeit the true owner's title for failure to extinguish the "cause" of forfeiture by complying with requirements that did not exist prior to the enactment 87

—(d) Because the State Court construes the Article to require the listing and payment of taxes for past years on each conflicting title to land, whereas prior to the enactment the Statutes required only one payment of a tax on the land irrespective of title 88

—(e) Because it expressly prohibits and prevents escape from the "cause" of forfeiture by payments of taxes made three months before the enactment and six months before the Act took effect 88

—(f) Because it requires as a condition of "extinguishing" forfeiture the payment of penalties that were not imposed at the time of the alleged delinquency nor prior to the enactment 88

(2) *It is also void as ex post facto because the plaintiff in error was a purchaser subsequent* to the latest of the alleged delinquencies and by the express provisions of the Statutes took title free from any obligations to pay prior taxes then assessed or unassessed 90

PAGES

II.—The same Article III is void because it violates the Compact between Virginia and Kentucky of December 18, 1789..... 96

The Compact and the preliminary acts 97
—the Act of Congress thereon..... 102
(1) in the General Assembly of Virginia..... 106
—resolutions of Va. Assembly March 22, 1822 106
(2) in the General Assembly and Courts of Kentucky 107
(3) in the Supreme Court of the United States 120
—Green *v.* Biddle 121
—Hawkins *v.* Barney 129
—declared to be "a law of the Union"..... 144
—summary of history of construction of Compact 146
(4) *The Compact is to be construed*
—(a) by the laws of Virginia existing Dec. 18, 1789 147
—(b) according to contemporaneous construction 147
—(c) according to same rules as ordinary contracts..... 150
—(d) according to same rules as treaties..... 150
—(e) " " " " of justice and equity..... 150
—(f) in a spirit of *uberrima fides* 150
—(g) without altering, amending or adding thereto..... 151
—(h) not to provide means for perpetrating frauds..... 152
—(k) in a liberal spirit not restrictive of rights under it .. 152
—(l) conclusively presumed that both States understood it. 153
—(m) restricts the Courts as well as Legislature of Kentucky 153
(5) *The Compact is violated by Article III*..... 154
—(a) *Because the intention of Virginia to protect the earliest title is shown* by cotemporaneous acts..... 155
—(b) *Because the Compact restricts Kentucky's power to forfeit* to the laws existing in Virginia on Dec. 18, 1789. 156
—(c) *Because at the date of the Compact, Virginia did not permit forfeiture* for any cause, not even for treason. 164
—(d) *Because at the date of the Compact there was no law in Virginia requiring the owner to list lands* if the same had been listed and taxes paid by others..... 170
—(e) *The Opinion of this Court in King* vs. *Mullins calls for a decision declaring this Article III to be void*... 170

III.—The same Article III is void because it impairs the obligation of contracts: (a) of the Compact; (b) of the original grants; and (c) of the deeds to plaintiff in error.

—(1) Grants from the State are protected like grants from individuals..... 179
—(2) The Supreme Court will determine independently of the State Court whether there is a contract and whether it has been impaired..... 179
—(3) Impairment by a change in the law is prohibited..... 181
—(4) Impairment by judicial decision is prohibited..... 182
—(5) Impairment by change of decision is prohibited..... 183

PAGES

IV.—The same Article III is void because it denies due process of law and equal protection of the laws 189

—(1) The plaintiff in error is protected by this clause of the Constitution 190

—(2) *The Fourteenth Amendment requires more than the due process theretofore required* 192

—(3) *A "day in Court" in the State Court does not make this Article or the proceedings thereunder constitutional* 193

—the judiciary as well as the legislature are bound by the Fourteenth Amendment 193

—(4) *The decision in King* vs. *Mullins does not sustain the Article and proceedings now at bar* 200

Because the West Virginia law

—(a) is not *ex post facto* 210

—(b) is not restricted by the Compact of 1789 211

—(c) has not been objected to as impairing the grant by making a condition subsequent what is lawful only as a condition precedent 212

—(d) provisions for redemption are fair 212

—(e) prospective only 212

—(f) not inconsistent 212

—(g) is not enforced by proceedings denying due process and equal protection 212

—(h) does not seek to forfeit at all costs 213

—(i) requires listing of whole interest 213

—(k) permits listing of only the parts not lost by adverse possession 214

—(l) saves those under disabilities 214

—(m) shows by its title that it is not a revenue act 215

—(n) does not exempt subsequent purchaser 215

—(o) provides fair opportunity for redemption 215

—(p) returns surplus to owners 216

—(q) each claim of title is taxed and there is no subrogation 217

—(r) does not apply to lands sold to State for taxes 218

—(s) occupant not liable for tax 219

—(t) is not accompanied with murderous threats of outlaws in possession 219

—(u) requires occupant to have color and good faith 219

—(v) purports to validate patents, not to exterminate them 219

—(w) had become a rule of property 220

—(5) *The plaintiff in error has been deprived of its property without due process of law and has been denied the equal protection of the laws* 226

—(a) *By unconstitutional discrimination* 226

PAGES

—(b) *By unconstitutional duplicate taxation* 227
—" there never has been a valid law in Kentucky by which the true owner could lose his land if taxes thereon were paid by any one else" 227
—Statutes of Kentucky relating to taxes and decisions thereon quoted 228
—argument of Court below that it is the "property of the claimant not the land" is contradicted by the terms of the Statutes and is irrelevant 238
—that argument also implies that the State *taxes two or more claims and recognizes and protects but one.* 239
—(c) *By allowing a hearing on the claim of unconstitutionality only at the risk, if mistaken, of being subject to confiscation of all its property* 243

(6) *Irrespective of the invalidity of the Article the proceedings thereunder deny due process and equal protection* 246
—these denials of due process and equal protection by the Courts below, summarized 246

(7) *Article III and the proceedings thereunder are not a constitutional exercise of the power of taxation* 249
—That power requires due process and equal protection. 249
—That power is not exempt from the prohibition against impairing contracts 252
—A fortiori such laws are void when a mere pretext for confiscation 257

(8) *Article III and the proceedings thereunder are not a constitutional exercise of "police power"* 261
—(a) Article III is not and does not purport to be an exercise of the police power, and cannot be made so by the judiciary of the State 262
—(b) Even if this Article III were an attempted exercise of the "police power" it would not be superior to the National Constitution 265
—(c) If private property be taken compensation must be made 282
—(d) Forfeiture is impossible as a condition subsequent to the grant 283
—(e) Escheat is impossible if heirs exist although unknown 284
—(f) Confiscation is justifiable only under the "war power." 284
—(g) Even treason does not justify confiscation 285
—(h) The Kentucky Courts declare Acts of Congress, more nearly an exercise of the police power than Article III, to be void 287
—(i) In the attempted extension of the police power "lurks no small danger to the Republic" 288

V. Conclusion.

PAGES

Article III is void 289
—The proceedings thereunder are void irrespective of the provisions of the Article 289
—the lands sought to be confiscated are not the homes of occupants but unenclosed forests 292
—the patentees were not mere speculators and adventurers. 292
—the mere pittance was paid not by them but by those who seek to obtain the benefits of confiscating these titles, who paid but 5 cents per acre, and have done no more than the patentees to improve the lands 293
—title has not been lost by "abandonment" 295
—non-payment of taxes not proved 296
—reasons for failure to pay taxes explained 297
—no protection of the owners against violence and no benefit from the government 297
—increase in value of these lands has come not from settlers but, from railroad attracted, not by settlers, but by coal and timber 297
—plff. in error cannot be punished for alleged delinquencies of former owners 299
—*Art. III needless for any honest purpose* 300
—not needed for purposes of revenue, which has been refused in order to forfeit 300
—not needed to protect rights of settlers 301
—not needed to settle titles 302
—needed by instigators for unlawful purposes 303
—not only needless but void 303
—not sustained by West Va. laws or by King *vs* Mullins ... 303
—seeks to tax two claims and protect but one 303
—"day in Court" a mockery 306
—the power behind Art. III is not the "war power," nor
—the "revenue power," nor the "police power" 308
—is a power transcending the Constitution of the Nation and that of the Universe 309
—is approved as "highly politic" 311
—the distinctions between "police power" and "politic power" considered 312
—the Spirit of Kentucky's ancient objections to the National Constitution and the Supreme Court 313
—the dire outcome of the union of a West Virginia doctrine of confiscation with a Kentucky doctrine of "politic power" 314
—the welfare of Kentucky and of the whole Nation calls for nullifying the Article and proceedings thereunder 315

STATEMENT.

These two cases come up on writs of error to review two judgments of the Court of Appeals of Kentucky.

The Earlier Judgment, December 20, 1907 (Record No. 223, fol. 137), affirmed, after hearing together the Appeals from, the judgments of the Circuit Courts for Pike, Floyd, Knott and Letcher Counties, which respectively, had affirmed the orders of the County Courts of the same Counties, and had denied and dismissed the petitions filed by the plaintiff in error, in December 1906, in each of those County Courts, to list its lands in those Counties, respectively, for assessment and taxation under the provisions of Article III of the Kentucky Revenue Act, approved March 15, 1906.

The Later Judgment, June 20, 1908 (Record No. 224, fol. 338), affirmed the judgment of the Pike County Circuit Court, of February 14, 1908 (*Id.*, fol. 303-338), which purported to declare the forfeiture of the title of plaintiff in error to its lands in Pike County on the ground that it had failed to so list its lands.

These two cases relate to the same lands in Pike County, Kentucky. The first (No. 223) also relates to adjoining lands of the plaintiff in error in the other three above mentioned Counties.

The earlier case (No. 223) contains the record of the attempt of the plaintiff in error to avoid the (foreseen) later attempt of its enemies, by the proceedings in case No. 224 to forfeit its title on the pretext of a failure to comply with the terms of the above mentioned Article III.

All that part of the Record No. 223, which contains the proceedings in the Pike County and Circuit Courts was filed by plaintiff in error as an exhibit with its Answer in the later case of attempted forfeiture No. 224 (Record No. 224, fol. 236), but the trial Court in case No. 224 sustained a demurrer to that part of its answer which set up the proceedings in case No. 223 as a de-

fense (Record No. 224, fol. 232), and prevented the reading of those proceedings to the jury (Id., fol. 303). The Court of Appeals, however, in its opinion in Case No. 224, considers the record in Case No. 223 in connection with the answer of plaintiff in error in case No. 224 (Record No. 224, fol. 341).

The whole of the above mentioned Article III, is set forth in the Opinion of the Court of Appeals and appears in the Record of No. 223 (fols. 139–151). The entire Act is published as Chapter 22 of the Laws of 1906 (Ky. Acts, 1906, pp. 88–248). Under the Kentucky Constitution it went into effect ninety days after adjournment of the Legislature (Ky. Const., Section 55; Boggs *v.* Commonwealth, 121 S. W., 433; Dissenting Opinion of Judge Hobson, Record No. 223, fol. 316).

It is entitled, "An Act relating to Revenue and Taxation" and consists of 318 sections divided into 19 Articles, all of which, except those of Article III which contains 10 Sections, are the ordinary provisions of an Act relating to the subject declared by the title of the Act and are generally re-enactments, in substantially the same form, of prior Statutes of Kentucky.

It is the same enactment that was recently brought before this Court in the case of Kentucky Union Co. *v.* Commwealth of Kentucky (No. 193); but the cases now at bar involve many more questions because (1) the plaintiff in error now before the Court did not become an owner of the land until after the period of the alleged delinquency in payment of taxes prior to the Act, and (2) claims title under patents granted by Virginia before the existence of Kentucky, and hence protected by the Virginia-Kentucky Compact, and (3) endeavored, so far as it was able, to comply with the requirements of Article III.

The Attorney General and Assistant Attorney General of Kentucky in an able brief filed on the hearing in the Court of Appeals of Case No. 223 (after a careful comparison of the provisions of this Article III with the provisions of Article I and II of the same Act), declared that

"These provisions (of Articles I and II) of Chapter 22, Acts 1906, have been copied therein from the Gen-

eral Revenue Law of the State in force prior to the passage of said Act. They constitute within themselves a complete and general system of law for the assessment of all lands in this Commonwealth, when the owner has failed or omitted to list the same for taxation.

"Article 3 of said Chapter is in conflict with this general system from beginning to end. It is sandwiched between the general provisions of the law and is *entirely new.* Either the general provisions of the law or this special law must be held invalid because they are so inconsistent; both cannot stand together" (Brief of Attorney General, p 7).

The conclusions of the Attorney General were confirmed by Judge Hobson, who, in the course of his dissenting opinion, says:

"By the general law the person owning land at the time it should be assessed is not only liable for the taxes but *remains bound* therefor; by this article the present owner's land is forfeited to the Commonwealth for *the non-payment of taxes by the former owner. By the general law if the occupant of land pays the taxes thereon, he is entitled to recover of the owner the amount so paid with interest, and has a lien on the land therefor; by this article, the fact that the land has been listed for taxation and the taxes paid by the occupant does not prevent the forfeiture as therein set out.* By the general law land may be assessed retrospectively at any time not later than five years, but *not to prejudice the rights of purchasers acquired in the meantime;* by this article the purchaser is required to pay the taxes with interest and penalty. By the general law if the owner sells the land after the 1st of February of the year in which the taxes are due and payable, it is the duty of the owner to pay the taxes; by this article the purchaser's title is forfeited if he does not pay them. By the general law where property has been sold for taxes, the owner may redeem it within two years; by this article the owner forfeits his title to the land if he fails to assess it and pay the taxes thereon as therein provided. By the general law if the owner fails to assess his property, it may be assessed retrospectively, but the taxes are then collected as other taxes; by this article the taxes are not collected as other taxes, but must be paid at once with interest and penalties to avoid a forfeiture of the title. By Section Four of this article, before the defendant may redeem, he must pay not only the amount of unpaid taxes charged, but those that

ought to have been charged against those under whom he claims for fifty years preceding the filing of the counterclaim. No such provision is found in the general law relating to other propety, and **there is no provision in the general law for double taxation of the same property, and the payment of the taxes by such claimant where there are two claimants to it."** (Record, No. 223, fols. 319–320).

Although this Court is not generally concerned with conflicts or contradictions in the Statutes of a State those here stated, it is submitted, come within the cognizance of this Court as among the indications of an intention to deny due process of law and equal protection of the laws; for which reason, among others, the Brief of the Attorney-General expressly declares that this Article III "is in conflict with both the State and Federal Constitutions"; and Judge Hobson after stating his opinion that the Article was void as an *ex post facto* law concludes also that

"A reading of the Article shows that it was a deliberate attempt on the part of the Legislature to deny the equal protection of the laws to the owners of the land titles referred to and to provide as to the holders of these land titles an entirely different system from that provided for the holders of other species of property. It is therefore in my judgment void both under the Constitution of this State and the Constitution of the United States" (Dissenting Opinion, Record, No. 223, fols. 316–321).

These conflicts, it is also contended, support the charge hereinafter made that this Article III was not the spontaneous act of the Legislature but the outcome of sinister influences, and the object of its enactment was not public good but the satisfaction of private greed (*infra*, p. 21).

Although the Act appears in full in the record, the sections, for the convenience of the Court, will be here quoted or summarized, the more notable parts being here emphasized by the type.

The Article consists of ten sections. Section I reads as follows:

I. It shall be the duty of each and every *owner or claimant* of land to pay all the taxes which have been assessed, and which should have been assessed, against him, and *those under whom he claims*, as the owner or

claimant of said land as of the 15th day of September, 1901, the 15th day of September, 1902, the 15th day of September, 1903, the 1st day of September, 1904, and the 1st day of September, 1905; and if said owner or claimant, *or those under whom he claims*, has failed to list said land, or any part thereof, for taxation, as of said dates, or any of them, it shall be *his* duty to have same assessed and listed for taxation in the manner and within the time hereinafter provided, as of each of said dates for which the assessment has been omitted, and *to pay* the taxes, interest and *penalties* thereon as herein provided.

The fact that said land has been listed for taxation, or the taxes have been paid thereon, by another claimant, shall not relieve against the duty herein imposed.

If any such owner or claimant or those under whom he claims, has failed to list such land for assessment and taxation, *as of any three of said dates*, or has failed to pay the taxes charged, or which should have been charged against him, or those under whom he claims, as the owner or claimant thereof upon said dates, *for any three of the years* for which said assessments *were or should have been* made, *said owner and claimant* and those under whom he claims *are hereby declared to be delinquent;* and such failures, or either of them, shall be *cause for the forfeiture* and transfer to the Commonwealth of his said claim and title thereto, in a proceeding to be instituted for that purpose, as hereinafter provided. But *said cause for forfeiture* shall be extinguished if said owner or claimant, his heirs, representatives, or assigns shall, within the time and in the manner in this article provided, cause said land to be assessed for taxation, and, on or before March 1, 1907, pay the taxes charged, and which *should have been charged* against him, or *against those under whom he claims*, as the owner or claimant thereof, for each and *all of said five years*, for which he or those under whom he claims are delinquent, together with the interest and penalties provided by law in case of the redemption of land sold for the nonpayment of taxes." (Record No. 223, fols. 139–140).

This section holds the essence of the venom of the Article, and is, it is submitted, void, because it is *ex post facto* (*infra*, pp. 8, 74–96); violates the obligation of the compact between Virginia and Kentucky (*Id.*, pp. 97–170); and the obligation of the original grants of the land by Virginia (*Id.*, pp. 179–189), and denies to its victims due process and equal protection of the laws (*Id.*, pp. 189–288). Shining

out among the marks of its evil origin and purpose is the sentence here emphasized by the type, viz.:

"*The fact that said land has been listed for taxation or the taxes have been paid thereon by another claimant shall not relieve against the duty herein imposed.*" The Court of Appeals cited p. 1036 Gen. Stats. as proof of its statement that "the provision existed under the General Statutes" (Record 223, fol. 183).

The reference is most unfortunate. The section found at the place cited by the Court is (in Bul. & Fel. Ed., 1887) as follows: "§ 8. Lands and town lots and the improvements thereon *shall be valued for taxation without reference to any conflicting title.*"

There is no provision similar to that above cited from Article III at the place cited by the Court nor anywhere else in the General Statutes or in any other statute of Kentucky; nor in this act of 1906, except in Article III; nor in this Article III, except in this Section I which relates to delinquencies prior to the act, for there is no similar provision in Section 10 which relates to future delinquencies (*p. 19, infra*).

Although by the Petition for Rehearing (Record No. 223 fol. 266) the attention of the Court was called to this very serious error, it has not been retracted nor corrected. The error is especially serious because, as hereinafter shown, taxes on all or almost all these lands have been paid by adverse claimants, and the statutes of Kentucky for many years past have provided, and the provisions of other articles of this same Act of 1906 still provide, that an occupant or lienor paying the tax is subrogated to the claim of the Commonwealth against the owner of the land.

It is with reference to this that Judge Hobson says in his dissenting opinion, already quoted (*supra*, p. 4) that *there is no provision in the general law for double taxation of the same property where there are two claimants to it.*

And the Attorney-General referring to this same provision in his brief at the hearing before the Court of Appeals said:

"Although the occupant of such land has listed and paid the tax thereon which by the provisions of Sec-

tion 7 of Article I of Chapter 22, satisfies the requirements of the revenue laws of this State for the assessment and taxation of land *because said section provides that land shall be valued without reference to conflicting title;* and though the occupant may have paid the taxes in compliance with this law, the real owner of this land is required to pay the taxes again on said land before he is enabled to redeem his land. This is clearly double taxation upon such lands and is in conflict with Section 171 of the State Constitution, which provides that taxation shall be uniform and equal on all property subject to taxation within the Commonwealth (Attorney-General's Brief, pp. 23–24).

And again he said: "By Section 12 of Article 2, Chapter 22, it is provided that the person owning land on the first day of September in the year in which it is listed is not only liable for the taxes but shall remain bound therefor. While Section I of Article 3 provides that the present owner's land shall be forfeited to the Commonwealth for the non-payment of such taxes by such former owner.

"By Section 15 of Article I, which is a re-enactment of the former Revenue law of the State, it is provided that the occupant of such land shall pay the taxes thereon which the owner ought to pay, and that such occupant shall be entitled to recover of such owner the amount of such taxes so paid and interest, and the same shall constitute a lien on the land."

"Section I of Article 3 provides that the fact that said land has been listed for taxation, and the taxes paid thereon by such occupant shall not prevent the forfeiture set out therein.

"Section 3 of Article I of said Chapter 22 provides that when any lands or improvements shall not be assessed in any one year it may be assessed retrospectively in the manner provided for by law for that year any time not later than five years thereafter, *but the lien thereby accruing shall not affect the rights of purchasers acquired in the meantime.* . . . By Section 5 Article I of Chapter 22 by amendment of the former law, it is provided that if 'A' purchased the lands of 'B' after February 1st of the year in which the taxes are due and payable, it shall be the duty of 'B' to pay the taxes thereon. Yet Section I of Article 3 requires that 'A' should pay the taxes." From all of which the Attorney General concludes that—

"Section I of Article 3 is a penal statute *in so far as it provides for the forfeiture of the title of the owner for*

the non-payment of taxes of others, is both ex post facto and a law impairing the obligation of contracts. That in so far as it attempts to vest the title of the owner of the land in the Commonwealth in the manner therein set out, it is the taking of the individual's property for public use without compensation, without the consent of his representatives or without just compensation made therefor" (Atty. Gen'l's Brief, pp. 21–23).

The Court of Appeals sought to justify this provision by the foregoing erroneous statement of fact followed by the contention that duplicate taxation is not *per se* unconstitutional (Record No. 223, fol. 183). But this is not a mere case of duplicate taxation. It is a case of *ex post facto* duplicate taxation. Not only this, but also of *ex post facto* taxing the same owner for a tax which he must also pay to the occupant whom the State has subrogated to its claim. Not only this, but also forfeiting his land for failure to submit to the unconstitutional extortion (*infra*, p. 13); the forfeiture, too, being for an alleged delinquency of a former owner and intended for the benefit of private parties who procured the enactment, and the whole edifice being attempted to be supported by the unfounded statement of the Court that there was a similar provision in prior laws.

This section also expressly states that the owner is "hereby declared to be delinquent" for the alleged past delinquencies of "those under whom he claims" and that the failures prior to the Act "of those under whom he claims" shall be "*cause* for the forfeiture" of his title. The same expression "cause for forfeiture" is used in Section 10 of the same Article which applies to future delinquencies, but as to the future it is only the failure of the owner, not of those under whom he claims, that is stated to be the cause for forfeiture, and for the future, after the date of the Article, the delinquency must be for five years (*infra*, p. 19).

In either case it is the failure to list as of the original dates that causes the forfeiture. Both the letter and the spirit of this Article III show this, and that the later judgment does not forfeit, but is merely the *declaration* of the forfeiture (Section 3, Record 223, fol. 144).

Would it be possible to state more clearly that it is the past failure to list these lands prior to the passage of this Act of Legislature that is declared by the Act to be the "*cause*" of forfeiture (although it was not such a "cause" prior to the passage of the Act) and that the failure to list after the passage of the Act, and on or before January 1, 1907, is not a cause of forfeiture but is a failure to "*extinguish*" the "cause," which in case of such failure simply persists as it was before, and according to the Article becomes after the 1st of January, 1907, "inextinguishable," no matter what the unhappy owner may do. This Article, being an attempt at forfeiture, must be strictly construed and held rigidly to its terms; but no difference in its terms or provisions, and no subterfuge, if attempted, to forfeit for failure to remedy after the Act a delinquency which in reality occurred, if at all, before the Act of 1906 would have validated the provisions to forfeit for failure to list for taxes that "should have been assessed" in the years 1900 to 1905.

Hence the ruling of the Court of Appeals that the land is forfeited by the failure to list after the Act, and prior to January 1, 1907 (Record, No. 223, fol. 187), is contrary to the express letter as well as the spirit of the Act. All of which was pointed out in the petition for a rehearing (Record, 223, fols. 281–282).

This Court is not bound to accept a construction of a state statute which is contrary to the clear meaning of the English language. But even if the construction of the Court of Appeals were sound it would merely shift the ground of the unconstitutionality of the Act. For the legislature had no more power to require the plaintiff in error, a purchaser subsequent to the alleged delinquencies, to pay taxes on these lands on which others had paid the taxes and been subrogated to the State's claim, than to pay taxes on other lands of a stranger or to pay the debt of a stranger who owned no lands.

Still less, if possible, could the legislature impose the penalty of forfeiture for the "delinquency" of failing to comply with such an unconstitutional attempt at extortion. For (as hereinafter shown) under the laws of Kentucky when plaintiff acquired title the purchaser of lands

owed no debt to the Commonwealth even for taxes that had been already assessed on the lands bought, and when taxes had not actually been assessed, although the same should have been assessed, he took the lands free even *from any lien* therefor (*infra*, p. 92).

Again, in its last sentence providing for exacting, under pain of failure to "extinguish" a "cause" of forfeiture, the payment of penalties for past delinquencies not imposed by law at the time of the past so-called delinquency, this section would be unconstitutional as *ex post facto* legislation (*infra*, p. 88).

This minor iniquity of the Act is also noticed by Judge Hobson, who, in his dissenting opinion, says:

> "By the law in force up to the time this act took effect, the owner of land which had been omitted from assessment might voluntarily have it assessed at any time and pay the taxes without interest or penalties. If he failed to list it voluntarily, and a proceeding was instituted against him under Section 4241 of the Kentucky Statutes, he was liable to a penalty of twenty per cent., which went to the officer instituting the proceding; but, even in this case, he was not liable for interest at ten per cent. on the taxes; and if he made the assessment voluntarily without a proceeding being instituted against him, he was not liable for the penalty of twenty per cent. While the act gives him until March 1, 1907, to list his property and pay the taxes, from the moment the act took effect the only way that he could escape the forfeiture of his title was to pay not only the taxes but the interest and penalty. The act does not give him a certain length of time to list his property and provide that if he fails to list within that time he shall be subject to the penalty, but it imposed the penalty upon all who are delinquent in listing their land and who would escape the forfeiture of their title by listing it after the act takes effect" (Record No. 223, fols. 317-318).

The Court of Appeals in another case construing this same Article III has half-admitted that this provision for penalty was void, but in order to sustain the act contended that the provision for penalty might be disregarded and the forfeiture nevertheless held valid (Kentucky Union *vs.* Commonwealth, 33 Ky. L. Repr., p. 11).

But in this the Court disregards the fundamental dis-

tinction between Statutes that forfeit for failure to comply with the terms of the act and those that do not; and the still more fundamental distinction where, as in this case, the payment of penalties is made a condition of redemption from a forfeiture that otherwise persists. The contention had been already answered by Judge Hobson who in his dissenting opinion in case No. 223, now at bar, says:

> "It is said that so much of the act as imposes the penalty for the past delinquency may be rejected; and that the balance of the act may stand; but this is not a case in which that rule can be applied—for the reason that the act forfeits the title of all persons who had failed to list their lands for the years named, and the only way in which they can escape the forfeiture is by paying the taxes with interest and penalty. If they do not pay the taxes interest and penalty *the forfeiture stands.* If that part of the Act which provides for the extinguishment of the forfeiture is invalid then there is no way in which the owner can escape the forfeiture" (Record No. 223, fols. 318-319).

The contention of the Court of Appeals is also contrary to the decisions of this Court as hereinafter shown.

Finally, even if this section of Article III could be sustained as against one who was an owner at the time of the alleged past delinquency, the construction which makes it apply against the plaintiff in error, who did not become an owner until after the latest of the alleged delinquencies, makes it unconstitutional under the National Constitution.

The opinion below states that the West Virginia Constitution contains "a provision in every feature or principle the same as the Kentucky Statute of 1906 except that in the West Virginia Constitution there is not a provision for a trial in court" (Record No. 223, fol. 164), and gives the impression that the Legislature and Courts of Kentucky are but following in the footsteps of the Legislature and Courts of Virginia and West Virginia, and even of this Court in its decision in King *vs.* Mullins (*Id., Ib.*).

A glance at the face of this Section I of Article III shows the lack of foundation for such a claim. The distinction between the statutes of Virginia and West Virginia on the one hand and those of this Article III on the

other are hereinafter shown (*infra*, pp. 210–225). It is enough to say here that there is, of course, not a trace of the *ex post facto* elements of Article III in any of the laws of Virginia or West Virginia relating to forfeiture of lands, and that the West Virginia laws do not, and those of Kentucky do, subrogate to the claim of the State an occupant or lienor who pays the tax on the land.

Again, as stated by the Attorney-General:

> "This Section One also denies the equal protection of the laws by making an arbitrary and unreasonable classification in that it provides for a forfeiture for failure to list lands for any *three* of the five years immediately prior to the Act, while Section ten of the same article provides for a forfeiture only for a failure to list lands for five successive years in the future. . . .
>
> "The Legislature cannot by one and the same act impose a heavier burden for the past years than it imposes for the future. The status of tax-payers for the three years prior to the Act in question was already fixed, and to provide a forfeiture for the failure to list for those three years without making a similar provision for the future was equivalent to making the provision for such a forfeiture apply to the persons by name who had already failed to list. If public policy demanded a forfeiture for failure to list for any three of five years, the forfeiture should have applied to future as well as past years, and the fact that it was not made to so apply *is conclusive that the Act was intended to serve some private interest and not to promote a wise public policy.*"

This Article III also *increases the penalty for omission, which, before the Act of 1906, read,* "not exceeding one hundred dollars" (Ky. Stats., § 4061, re-enacted in Rev. Act, 1906, ch. I, art. II, § 21), *and makes the penalty forfeiture of the land; and it attempts to cut off the previously and still existing power of the Court in all other cases except under Article III to excuse the delinquent altogether if satisfied that he "was not wilfully in default"* (Ky. Stats., § 4063, now in Rev. Act, 1906, ch. I, art. II, §. 23).

Section 2 of the same Article III provides that the ascertainment of the amount of taxes unpaid and the assessment required by the first section shall be made by the County Court upon application of the owner or claimant by verified petition filed in that court *on or before January 1, 1907*, stating the manner in which title devolved upon

the petitioner. It is made the duty of the County Court to decide upon the application *in a summary manner*, upon such evidence as may be offered, and to ascertain the amount of unpaid taxes which the applicant and *those under whom he claims should have paid;* either the petitioner or the Commonwealth feeling aggrieved by the finding of the County Court to have the right to appeal to the Circuit Court within thirty days after the finding. It is made the duty of the Circuit Court *to hear and determine the application de novo*, and its finding to be conclusive and not subject to appeal. *The applicant is required to pay the taxes found to be due on or before March 1, 1907.* (Record No. 223, fols. 140–143.)

This section merely carries out the intention of the article as stated by the Court of Appeals "to outlaw" the title of plaintiff in error (Record No. 223, fol. 166). As the Attorney General has well stated, it is inconsistent with Section 3 of Article 15, and Section 4, Article 16 [XVII] of the same Act of 1906, providing for the assessment of omitted property, and requires an assessment in an unreasonably limited time contrary to the general provisions of the laws of Kentucky expressed in other Articles of the same Act.

And notwithstanding that this section purports to provide for a hearing *de novo* in the Circuit Court, the Court of Appeals has held that neither the County Court nor the Circuit Court can permit amendment of the petition to list after January 1, 1907 (Commonwealth *v.* Gatliff, 116 S. W., 263, 265).

Section 3 of the same Article III provides that if the owner or claimant shall fail to have said lands assessed, or fail to pay the taxes charged, or which *should have been charged* against him or those under whom he claims, as provided and within the time prescribed in Sections one and two, *together with the penalties and interest* as provided, it shall be the duty of the Commonwealth's attorney to institute in the Circuit Court an equity proceeding in the name of the Commonwealth against the land and owners or claimants thereof, for the purpose of declaring the title forfeited to the Commonwealth and selling the same.

There is further provision that judgment rendered under this article *shall be conclusive against all defendants, including infants, lunatics, and married women*, and that judgments and the proceedings upon which they are based shall *not be subject to the provisions of Sections 391, 410, 414 or 574 of the Civil Code of Practice.* Issues as to whether or not the title and claim sought to be forfeited is subject to forfeiture to be triable by jury, and either party may prosecute an appeal to the Court of Appeals within thirty days after judgment (*Id.*, fols. 143-145).

The sections of the Civil Code of Practice from the trammels of which the proceedings to forfeit are freed by this section are intended for safeguarding the rights of married women, infants and the insane. By this section the Commonwealth abdicates and repudiates its office as their paramount protector in so far as they may be owners of land wanted by the instigators of this Article III.

In the words of the Brief, already mentioned, of the Attorney General:

> " This section is the most arbitrary abrogation of the rights of infants, lunatics and persons laboring under disability that ever a Legislature of Kentucky undertook to enact."

Section 4 provides that if, before or *during the term of Court next succeeding the term at which judgment of forfeiture* may have been entered, any of the defendants in privity with the forfeited *title*, shall file his counterclaim *accompanied by a sufficient bond and offer to purchase back* from the Commonwealth the title and claim so forfeited, *exhibiting title* thereto in himself, it shall be the duty of the Court to ascertain and adjudge the amount of unpaid taxes charged and that ought to have been charged against the defendant and *those under whom he claims*, as the owner or claimant of the land *for the fifty years immediately preceding* the filing of the counter-claim, and *if the Court finds that defendant is the owner* of the title forfeited, to enter a judgment against such defendant for a sum equal to the amount of such unpaid taxes, together with interest at he rate of fifteen p er cent. per annum from the time

said unpaid taxes for said several years were due, and the costs of the proceedings, including a reasonable attorney fee for the Commonwealth's attorney, and if such defendant shall pay the amount of said judgment it shall be the duty of the Court to enter a judgment retransferring to such defendant the title forfeited (*Id.*, fols. 145-148).

This section is a fair example of the unfairness of the entire article and of its spirit. As shown by the Attorney General, it is entirely inconsistent with the provisions for redemption contained in other Articles of the same act; and Judge Hobson, referring to the penalty of fifty years taxes, says: "No such provision is found in the general law relating to other property" (*supra*, p. 4).

The time to redeem is limited to the next succeeding term of the lower court, so that it would expire before the victim would have had time to have the validity of the forfeiture determined by this Court, or even by the Court of Appeals. This, in itself, makes the Article unconstitutional (*infra*, p. 243). He must also exhibit title in himself; pay taxes for fifty preceding years, although the State's claim to all taxes prior to 1879 have been released by statute (*infra*, p. 296), and the right to redeem is further restricted by the following Section 5.

Again, it is contended that the hand of private interests is shown through the terms of this Section, whose rigorous restrictions of the time and means of redemption and extraordinary imposition of penalties as conditions of redemption can find no parallel in the laws of any other State.

Section 5 of the same Article III provides that any owner or claimant who instituted *a proceeding to list* allowed by Section 2 and who did not, within the time limited, pay the amount ascertained as charged or chargeable against him and those under whom he claims, *shall not be allowed the right to purchase back* under the proceedings authorized by Section 4 (*Id.*, fol. 148).

In view of the rigorous construction of other sections of this Article in order to effect what the Court of Appeals has declared to be the intention of the Legislature, viz.: "to outlaw" the titles of plaintiff in error (Record No.

223, fol. 166) it seems not improbable that one who, like the plaintiff in error, had "instituted" a proceeding to list and failed to obtain an assessment would be held to be prevented by this Section 5 from redeeming or "purchasing back" its title; because the Court might easily hold in pursuance of the legislative intention "to outlaw" these titles, that the failure to obtain an assessment was the fault of the petitioner, and that hence he was excluded from redemption by the "spirit" if not by the letter of this section.

Section 6 of this same Article III provides that all title and claim forfeited to the Commonwealth and not purchased back as authorized in Section four, *whether such forfeiture be for past delinquencies* or for future delinquencies as authorized in Section ten, "IS HEREBY transferred to, and vested in, any person for so much thereof as such person, or those under whom he claims, has had the actual adverse possession for five years next preceding the judgment of forfeiture, *under claim or color of title*, derived *from any source whatsoever*, and who, or those under whom he claims, shall have paid taxes thereon for five years in which said possession may have been or may be held; **and in those in privity with such person,** his heirs, representatives or assigns, **as to the mineral or other interests or rights** in or appurtenant to such land." (Record, No. 223, fols. 148–149.)

To quote again the same Brief of the Attorney General.

> "*It is not until we reach Section 6 of this Article that the purpose and object of this legislation is disclosed,*"

and then quoting and emphasizing by the type the herein above quoted provision for "those in privity" with the occupant "as to the mineral or other interest" (and after citing the provisions of the Constitution of Kentucky against special legislation and the fifteen year limitation of an action for the recovery of real property (Ky. Stats., Section 2505) and other provisions of the same Act of 1906 which are inconsistent with this Section 6), the Attorney General concludes that this section 6

> "is not only inconsistent with these general provisions of the same Act but is in conflict with the general law of limitation and violates Section 59, sub-sections 5

and 29 and Section 60 of the State Constitution. "By this section the disseizor's possession is made to ripen into a fee simple title in five years by the forfeiture provided for in sections 1 and 2 of said Article and the transferring of the owner's title to such disseizor or occupant . . . *This is not only special legislation but it is a discrimination in the general law of limitation and denies the equal protection of the law of fifteen years limitation* to the owner of such lands."

Again in this Section do the marks of the real evil origin of this Article III appear. For it does not seem credible that a legislature acting of its own motion and merely for the public good would ever think of such a specific and careful solicitude for the interests of "those in privity" with the occupants "*as to the mineral interests*" and probably no similar provision can be found in the Statutes of any other State, nor in the Statutes of Kentucky except one other Act hereinafter referred to, procured by the same influential parties who seem to have uncommon facilities for obtaining the enactment and enforcement of unconstitutional legislation in Kentucky.

Those "influential" parties who, as plaintiff in error charges, procured the enactment of this Article have derived their claims to this land from occupants claiming under bogus "patents" issued by Kentucky officials against the Compact with Virginia but purporting to be issued under a Statute of Kentucky which *expressly prohibits and declares "absolutely void"* any patents issued for land already appropriated as all this land had been appropriated (*infra*, p. 294).

Section 7 of this same Article III provides that all title and claim forfeited to the Commonwealth and not purchased back by the owner or claimant as provided by Section four, and *not vested in the occupant*, as provided by Section six, shall be sold to the highest and best bidder for cash, the remainder of the money realized from the sale to be paid over to the former owner or claimant after paying the amount of said taxes, together with interest and penalties (including taxes for fifty years past) and costs of the suit, including commissioner's fee and a reasonable attorney's fee (*Id.*, fol. 149).

The provision in this Section 7 that the surplus of proceeds of sale shall be paid to the owner, is (like other provisions of the act and of the attempted arguments in its support) delusive and deceptive. Nothing is to be sold except where the land is not vested in the occupant (Section 7, Record, 223, fol. 149); and the statute vests in the occupants all land of which they have had adverse possession "*under claim or color* of title *derived from any source whatever*" (*Id.*, fol. 148), and the Court of Appeals has stated in regard to neighboring lands in this Section of the State that "the Court judicially knows that practically if not quite, all the land described in the petition is adversely held by occupants under claim or color of title" (Ky. Union Co. *v.* Commonwealth, 33 Ky. L. Repr., at p. 12), and the depositions of County officers in Case No. 224 show that occupants have paid taxes on all or almost all these lands (Record No. 224, fols. 265–299).

Section 8 of this same Article III provides that no action to enforce a forfeiture shall be instituted after the expiration of five years from the accrual of the right thereto (Record No. 223, fol. 150).

Section 9 of the same Article provides that **no owner or claimant shall be allowed to prevent the operation of this article by the payment after January 1, 1906, of any amount less than the whole of the unpaid taxes, interest and penalties** that were and that "*should have been*" charged against him and against "those under whom *he claims*, as of each of said five dates," and that "where such payment is made *after the passage of this act* the amount to be paid shall be ascertained, and payment *as in this article provided*" (*Id.*, *Ib.*).

This section fittingly crowns the work. By its terms, which are not easily reconciled, the unhappy owner might not escape from the toils of this Article, even if *before* the enactment, if after January 1, 1906 (which was more than three months before the enactment and more than six months before the Act became effective), he had paid all the taxes that had been charged for every year together with all interest and penalties. He certainly could not do so after the passage of the Act, although

under the Constitution it did not go into effect till ninety days after adjournment of the Legislature (*supra*, p. 2).

Nevertheless, he must still give the courts an opportunity to hold that his petition to list was insufficient. No case has been found in which the Kentucky courts have held a petition under this Act to be sufficient, except one judgment of a Circuit Court, which was reversed for that reason by the Court of Appeals (Commonwealth *v.* Gatliff, 116 S. W., 263).

This Section 9, the Attorney General has said,

"is in conflict with the general revenue law for the assessment of omitted property or land and one or the other must be held unconstitutional. It is both penal and retroactive; and it is a departure from the customary and general procedure for the collection of delinquent taxes, and denies to the owner the time allowed under the general law to redeem his land."

Section 10 of this same Article III is as follows:

"When *for any five successive years after the first day of August, 1906*, any owner or claimant of or to any land in this Commonwealth shall fail to list same for taxation and cause himself to be charged with the taxes properly chargeable thereon, or fail to pay the same as provided by law, then *such failure* shall be *cause* for the forfeiture of his title and claim thereto and the transfer of the same to, and vesting it in, the Commonwealth of Kentucky. And wherever such failure exists, it shall be the duty of the Commonwealth's attorney to institute an equitable action in the Circuit Court of the county wherein the said land, or a part thereof, lies, for the purpose of *declaring* said forfeiture and vesting said title and claim thereto in the Commonwealth of Kentucky, and for the sale of such parts thereof as, *under the provisions of this article*, are liable to sale. Such actions and proceedings pertaining thereto shall conform to the provisions of this article as far as the same may be applicable" (*Id.*, fol. 150).

This final section of Article III is chiefly interesting as showing the discrimination against those who were claimed to be delinquent prior to the Act as compared with those who might be delinquent five years later. The instigators of the Article were not much interested in what might happen five years thereafter. Their efforts were concentrated upon obtaining immediately the cov-

eted title that Section 6 of this Article declared "shall be and is HEREBY TRANSFERRED" to the occupant and "those in privity with such person, his heirs, representatives or assigns as to the mineral or other interests or rights in or appurtenant to such land" (*supra*, p. 16).

This Section 10 requires as condition of forfeiture that there shall be a delinquency for five years instead of for any three of five years as in Section 1 (p. 5, *supra*), and omits the statement that the claimant shall not be relieved from the duty to list by the fact that the land has been listed and taxes paid thereon by another claimant, which appears in Section 1 with respect to delinquencies prior to the Act (*Id.*, *Ib.*), but was not contained in any prior law of Kentucky and is not contained in the other Articles of this Act.

Again it is submitted that it is incredible that provisions of this character could have been adopted by any Legislature acting solely for the public good; and that it is reasonable to seek elsewhere for the motives and the real promoters of this Article III.

The plaintiff in error now charges, as it has charged from the outset of the proceedings in the courts below and in a brief on its behalf in Court of Appeals on the hearing of Case No. 224, that

> "**The instigators** of this Article III and of the proceedings thereunder were and are certain corporations and their largest stockholders, who had purchased claims (junior and adverse to the appellant's title), mainly of mineral interests, in several hundred thousand acres of these wild lands (see Northern Coal & Coke Co. *v.* Nield, 29 Ky. L. R., 188), and for which they paid generally prices ranging from 50 cents to $5 per acre."
>
> "They are the same as those who in another desperate attempt to bolster up their claims procured the enactment of the Act of February 26, 1906, "relating to the possession of land and interests therein where there has been or may be a severance of the mineral or other interests from the surface" in which is manifested so tender a regard for "the holder of said mineral interests and rights" (Acts 1906, Ch. 7, p. 19) as to declare that the grantor after conveying his mineral interests "shall be *deemed* to have been in possession of such mineral interests . . . for the benefit of" the

grantee, although in law, in fact and in truth, the grantor was *not* in possession of anything but the surface. It is these same other corporations or their promoters that secured the enactment of Article III of the Revenue Act that manifests such haste, harshness and hunger for an attempted forfeiture of the title of the true owners, with a ruthless and brutal disregard, even of the interests of married women and children, a period of redemption of hitherto unheard-of brevity under conditions of hitherto unheard-of severity in order that the title of the true owner (not even *shall* be, but) "**Is Hereby Transferred** to and vested in any person . . . who has had the actual adverse possession for five years next preceding the judgment of forfeiture under claim or color of title, derived from *any source whatever*, and who . . . shall have paid taxes thereupon for five years . . . and in those in privity with such person . . . *as to the mineral or other interests appurtenant* to such land."

"**The Object** of the promoters of this Article III was to vest the appellant's title in those promoters as purchasers from so-called "occupants" who had not been in actual occupation, nor improved the lands, but who paid to officials of the Commonwealth five cents per acre for "patents" which the Legislature of Kentucky had previously declared should be "absolutely null and and void"; the appellant's ancestors in title having long before paid to the Commonwealth of Virginia for the same land "one pound and twelve shillings current money" per acre, and thereby obtained a title which the Commonwealth of Kentucky has solemnly covenanted shall "remain valid and secure" and "shall be determined by the laws now (on December 18th, 1789) existing in "Virginia."

"**The Pretended Purpose** of the promoters of Article III was to raise revenue, which was probably the only reason which could be thought of to induce the Legislature to include this Article in a Revenue Act. The hollowness of this pretext is shown by the depositions of the Sheriffs in the record now brought to this Court, which show that taxes have been paid by others than the appellant on all these lands, and by the statements to the same effect made prior thereto by the counsel for the promoters of Article III who were allowed to step into the shoes of the Attorney General for the Commonwealth and to oppose the appellant's petitions to list and pay taxes on the lands (Brief for

Appellee on former Appeal, pp. 62, 66, cited in Appellant's Petition for Rehearing, pp. 45–46). It is also shown by the fact that the Act seeks to forfeit the rights of infants, married women, the insane, and all remaindermen who have no existing rights to the land and are not liable for the taxes during the ownership of the life tenant and even the title of subsequent purchasers" (Appellant's Brief, pp. 90–94; 113–116; Petition for Rehearing, pp. 68–72)."

"That the true motive of the procurers of the enactment of Article III of the Revenue Act was not the public good but private greed, is, it is submitted, shown also in the proceedings on the former appeal, in which the active opponents of the appellant were also counsel for one or more of these other corporations, and in which the representatives of the Commonwealth, which was a formal party to those proceedings, were placed in the singular position of endeavoring to prevent the listing of lands for taxation and the payment thereunder by the appellant of large sums into the public treasury.

"So, too, in these suits for attempted forfeiture now before the Court, the real prosecutors in the name of the Commonwealth in the courts below, were the counsel for these same other corporations and their principal stockholders."

"**The real purpose** of the promoters of Article III was the same as has been already found by this Court to have been the purpose of the Legislature, to-wit, to "outlaw" these titles (Opinion, p. 142) under the forms of law. It was doubtless in pursuance of such a purpose that the courts refused to accept appellant's petition to list for alleged defects in the form of the petition, without giving appellant an opportunity to amend, and that in the suits now pending for forfeiture based upon appellant's failure to list, because prevented by the Court, the Court has refused to permit appellant to prove facts in its defense set up by an amended answer offered before the trial of the cause."

"**The attempted excuses for this purpose,** so far as any have been disclosed, are stated in the Opinion of the Court on the former appeal (Opinion, pp. 136–143), which are answered in the appellant's petition for rehearing (pp. 2–27), where are also shown the origin of appellant's title, the character of the patentees under whom appellant claims title, the large price paid by them for the land, the character of these wild lands, and the violence of some of the occupants, and the pay-

ment of taxes by others, and other reasons why those under whom appellant claims title have not paid taxes during the five years prior to the enactment of Article III (*Id., Ibid*)."

Some of the counsel employed by these private parties who were active in the litigation in the Courts below appear now on the record of this Court and at the bar of this Court on the side of the Commonwealth in these cases, doubtless by permission of the Attorney-General, who from a sense of fairness desires that they shall have an opportunity to be heard in behalf of a cause that he or his predecessor has so heartily condemned.

The incorporation of the plaintiff in error, its objects, and the method and time of its acquisition of title are set forth in its Amended Answer in Case No. 224, as follows:

"(1) That this defendant was duly incorporated under the laws of the Commonwealth of Virginia on the 7th day of February, 1906, and its purposes were and are, as stated in its Charter, 'to purchase, acquire and hold 'lands and titles, claims and interests in, upon or affect-'ing lands and appurtenances thereto, situated in all or 'any of the States of Kentucky, Virginia and West 'Virginia, and to do whatever may be deemed expedient 'to protect and enforce said titles, claims and interests, 'and if it be deemed expedient, to improve and develop 'said lands or any parts thereof, or interests therein, by 'mining operations or otherwise, and to sell and con-'vey, mortgage, lease or otherwise dispose of any or all 'such lands, titles, claims and interests aforesaid, or 'parts thereof at one time or from time to time as may 'be deemed expedient';

"(2) That for many years prior to the incorporation of this defendant the titles to the lands described in the plaintiff's petition herein had been unsettled because the true title was vested in those who were entitled thereto under and by virtue of the grants from the Commonwealth of Virginia referred to in the plaintiff's petition herein, except in so far as the right of entry of said true owners to parts thereof had been tolled by an actual adverse possession by others for a period of time and under the other conditions required by law to toll such right of entry of said true owners; that the evidence regarding the origin, condition and extent of actual adverse possession to any parts of said lands, was generally

vague, indefinite, conflicting and not of record, and the threats by some of the occupants of violence against any and all claiming title under said grants from the Commonwealth of Virginia prevented said true owners from entering upon any parts of said lands or from ascertaining or protecting their lawful interests therein; whereby the development of the resources of said lands had been retarded, because the title thereto was regarded by investors as unmarketable; that for the purpose of uniting under one ownership the titles, claims and interests of those deriving the same from said grants from Virginia and of consolidating the same with claims by adverse possession of the same lands in order to have a marketable title thereto, for purposes of development of the resources of said lands the defendant Charles B. Hillhouse and his associates had already prior to the incorporation of this defendant spent much time and money in examining records in the States of Virginia and Kentucky and elsewhere and had acquired much information relating to what appeared to be such earliest titles of record claims and interests in the Counties of Pike, Floyd, Knott and Letcher in the State of Kentucky and the claimants thereof, and had contracted to purchase from some of such claimants, and was then negotiating with and expecting to purchase from many other claimants of similar titles, claims and interests in and to lands in said Counties, the aggregate quantity of land covered or affected by such titles, claims and interests purchased or sought to be purchased by said Hillhouse from such claimants being between Three hundred thousand acres and Five hundred thousand acres;

"(3) That thereafter, on the 8th day of February, 1906, this defendant, Eastern Kentucky Coal Lands Corporation, entered into an agreement with said defendant, Charles B. Hillhouse, in writing, and under the seals of the parties thereto, executed, acknowledged and delivered on said 8th day of February, 1906, whereby, among other things, said Hillhouse, for a valuable consideration, duly agreed to sell, and on receipt of the consideration therein stated to convey, to said Corporation (to-wit, this defendant), or its assigns, any of such titles, claims and interests then or thereaafter purchased by said Hillhouse that said Corporation (to-wit, this defendant) should elect to purchase. That immediately thereupon said Hillhouse proceeded diligently to fulfill said agreement and to complete negotiations and purchase such titles, claims and interests and

has ever since continued so to do, and said Corporation (to-wit, this defendant) has from time to time elected to purchase many of said titles, claims and interests in and to the various tracts of land described in the plaintiff's petition herein; and by deeds from said Charles B. Hillhouse to this defendant, dated and duly acknowledged and delivered on the 21st and 24th days of December, 1906, in pursuance of said Hillhouse's prior agreements to convey to this defendant, including the aforesaid agreement of the 8th day of February, 1906, said Charles B. Hillhouse, for valuable considerations, duly conveyed to this defendant, said Eastern Kentucky Coal Lands Corporation, titles, claims and interests in and to each and all of said tracts of land which said Hillhouse prior thereto had acquired by deeds to him, duly executed, acknowledged and delivered by many owners of undivided interests in said tracts of land respectively;

"(4) That this defendant was not an owner or claimant of any of the lands described in the plaintiff's petition herein or of any part thereof or interest therein on the 15th day of September, 1901, nor on the 15th day of September, 1902, nor on the 15th day of September, 1903, nor on the 1st day of September, 1904, nor on the 1st day of September, 1905, nor at any time between or prior to said days, nor thereafter prior to the aforesaid 8th day of February, 1906, on which last mentioned day this defendant Eastern Kentucky Coal Lands Corporation and the defendant herein Charles B. Hillhouse entered into the agreement aforesaid: That said Hillhouse was not an owner or claimant of any of the tracts of land described in the plaintiff's petition herein, or of any part thereof, or interest therein on or at any time prior to the 1st day of September, 1905, and that none of the titles, claims and interests so purchased by said Hillhouse, were purchased or conveyed or agreed to be conveyed to him until after the 1st day of September, 1905; that such titles, claims and interests were respectively in and to undivided shares of the tracts described in the plaintiff's petition herein; that some thereof were purchased by said Hillhouse and sold by him to this defendant prior to the enactment of the Act relating to Revenue and Taxation, approved March 15, 1906, and described in the plaintiff's petition herein (Record, No. 224, fols. 238–242).

The method adopted by the plaintiff in error of acquiring the legal title under the most ancient patents as a preliminary to settling with occupants and merging all con-

flicting claims under one ownership is, it is believed, the method which has generally been adopted by those seeking to produce a marketable title for development of wild lands in West Virginia and Kentucky.

Case 223—The Attempt of Plaintiff in Error to Comply with Article III by listing the lands.

Confronted with this amazing Article III of the Act of 1906, the officers of the plaintiff in error were advised by counsel and believed that the Article was, and any proceedings to enforce it would be, unconstitutional as against the prohibitions of the National Constitution as well as of the Constitution of Kentucky. But they feared the ill will of the officials of the Commonwealth that would result from a neglect to attempt to comply with the Article, and were then, of course, unaware that the Article would be construed and vigorously enforced by the courts as a method "to outlaw" its titles (Record, No. 223, fol. 166).

They also feared the possible cloud upon the title of plaintiff in error and other evils that would come from the attempt to enforce the provisions of that Article III by means of proceedings such as those shown in Case No. 224, which were conducted in the name of and ostensibly on behalf of the Commonwealth, but in truth, as plaintiff contended in the courts of Kentucky and still contends, mainly for the benefit of the instigators above referred to who are designated by name in the answer of the plaintiff in error (Record No. 224, fols. 215, 216, 218, 219, 220).

Hence, Case No. 223 was begun in December, 1906, by the plaintiff in error by filing in the four above mentioned County Courts, its petitions to list its lands.

The petitions to list are in the record of Case No. 223 (for Pike County, fols. 95–112; for Floyd County, fols. 68–81; for Knott County, fols. 49–56; for Letcher County, fols. 13–21).

The Court of Appeals in the Opinion in Case No. 224, says that the petition for Pike County in Case No. 223,

was filed by plaintiff in error "claiming to comply with the provisions of the Act and at the same time attacking its constitutionality (Record, No. 224; fol. 341).

The petitions were all in the same form. After stating the incorporation of plaintiff in error, and its objects as stated in its charter there follows the here following, viz.:

"II: Your petitioner claims to be an owner of the hereinbelow described tracts of land situated in the County of , State of Kentucky, *but not of the improvements thereon nor* of the *surface* of *certain parts* of said tracts as hereinafter stated."

Thereupon follows the descriptions of each of the tracts; stating the number of acres, the date of survey, the County in which the land was at the date of the survey; the County in which it was at the time of making the petition; the State, whether Virginia or Kentucky, by which the Letters Patent were granted; the date and place of record of the Letters Patent in the Land Office of Kentucky, and also in the Land Office of Virginia when granted by Virginia. Each tract is also described in the petition to list by full metes and bounds as described in the Letters Patent; and the petition further states in each case which (if any) side of the tract is bounded by a State or County line or natural monument, such as a river, and designates by the number stated in the petition each tract which adjoins the tract described; and on which side it so adjoins; so that from the statements of the petition a map might be made in half an hour's time which would show the local relation of each tract to all the others and to the County lines, and to the principal natural monuments. In the case of tracts crossed by a county line the petitioner stated to the best of the ability of its officers how many acres were estimated to lie within the County in which the petition is filed (see, for instance, the petition for Letcher County, Case No. 223, fols. 13-21).

These descriptions are immediately followed by the here following sections, which complete the petitions except the signatures and verifications, viz.:

"III: Your petitioner claims said tracts of land respectively under the grants stated respectively in the foregoing descriptions of said tracts; and the instru-

ments through which title to each of said tracts devolved upon your petitioner, are deeds from Charles B. Hillhouse, grantor, to your petitioner grantee, dated respectively the 21st and 24th day of December, 1906, not yet recorded, conveying all the right, title and interest of said Charles B. Hillhouse in and to each of said tracts of land respectively, the title of said Hillhouse having been derived by deeds to him by others claiming by inheritance devise or mesne conveyances from those to whom said tracts of land respectively were granted as aforesaid by the Letters Patent above described respectively."

"IV: Said tracts of land have not been listed for taxation for any of the years 1901, 1902, 1903, 1904 or 1905 by your petitioner, nor, as your petitioner is informed and believes, by any of those under whom your petitioner claims, nor have the taxes for any of said years been paid by your petitioner, nor, as your petitioner is informed and believes, by any of those under whom your petitioner claims; but your petitioner is informed and believes and therefore avers and alleges that parts of each of said tracts have been listed for taxation for each of said years by occupants and others than those under whom your petitioner claims, and that taxes for each of said years on parts of each of said tracts have been paid by said occupants or others."

"V: Your petitioner does not claim to be the owner of any improvements on any of said tracts of land, nor of so much of said land as has been adversely held by others for a period sufficient to toll the petitioner's right of entry."

"VI: Your petitioner is advised by counsel learned in the law and believes that in all of said years and now, under the laws of the Commonwealth of Kentucky, whenever the occupant or occupants of any part or parts of any of said tracts have paid the taxes thereon which those under whom your petitioner claims ought to have paid or ought to pay the person so paying the tax shall be entitled to recover of the owner the amount of the tax so paid and interest, which shall continue a lien on the property upon which such tax was paid."

"VII: Your petitioner now files his petition under the provisions of Article III of an Act of the Legislature of the Commonwealth of Kentucky, entitled 'An Act relating to Revenue and Taxation,' approved March 15, 1906, and applies to and asks this Honorable Court to ascertain the amount of unpaid taxes which your petitioner or those under whom your petitioner claims should have paid for any and all of said years 1901, 1902,

1903, 1904 and 1905 and to make the assessments required by said Act of the Legislature."

"And as in duty bound, so your petitioner will ever pray."

Counsel for the instigators of Article III on the first hearing before the Court of Appeals objected that "the appellant became a voluntary participant in judicial proceedings, which, by fair inference, acknowledge the validity of the statute in question, and is, therefore, precluded from attacking it as unconstitutional." To this the plaintiff in error answered in the petition for rehearing: "This objection indicates to what straits the promoters of Article III may be ultimately driven in their attempts to effect their purpose. The statement is not even consistent with the statement previously made by the same counsel, for another purpose, in another part of the same brief, viz., that the appellant '*seeking the benefits* of Article III, but *denying its constitutionality*, filed its petition in the Pike County Court.'

"The objection seems to have been already overruled by the Court, in ruling that 'The constitutionality of the act is questioned by appellant. The question must be decided, as, if it is unconstitutional, appellant would have had the right to list its lands under other provisions of law relating to the assessment of omitted property.'

"The Court, therefore, seems to be in no need of authority to show that an objection to the constitutionality of a law is not waived by complying, or offering to comply, with some of its provisions in order to avoid some of the injury from its unlawful threats and penalties. If any authorities are wanted, here are, surely, enough: O'Brien *vs.* Wheelock, 184 U. S., 450, 492; U. S. *vs.* Seven packages of tea, 126 Fed., 224; Holcomb *vs.* Boynton, 151 Ill., 300 (37 N. E., 1033); Moredock *vs.* Kirby, 118 Fed., 180."

"An attempted forfeiture under this 'Article III' would have clouded appellant's titles, and appellant was seeking, not a benefit, but to avoid an injury."

The Court of Appeals admits that the descriptions in these petitions " were sufficiently explicit to have located the several boundaries " (Record 223, fol. 189) and hence, necessarily, sufficiently explicit to "identify" the land within those boundaries as required by the Article. The Court's main objection as stated in the Opinion in the case at bar was that the petitions failed to identify those parts of the surface which had been lost by adverse possession; but according to the later ruling in another case the real objection was not that the petitions failed to identify the excluded parts but that the petitions excluded any parts of the land within the boundaries of the patents. For after holding in the case now at bar that the excluded parts must be identified, under pain of forfeiture of all not excluded, the Court soon afterwards in another case held under the same penalty of forfeiture that no parts must be excluded even if identified and that Article III required the petitioner *to list and pay taxes on all the land described in its muniments of title whether or not it was certain that parts belonged to adverse claimants* (*infra*, p. 47).

As herein elsewhere shown this exclusion was not a ground for forfeiting title, for (1) the full description of all the land within the patents being given, the exclusion, could have been disregarded; and (2) although the petitions stated a disclaimer of the parts owned by others the petitioner did not in the petitions refuse to pay taxes on those parts, but on the contrary, at the hearing, offered to pay taxes on all the lands within the boundaries of the patents (*infra*, p. 34), and the County Court having all the facts before it from the statements in the petition, it was under the express terms of the Statute the duty of the County Court, not of the petitioner, to make the assessment and determine the amount of the tax (*infra*, p. 57); and the plaintiff in error could not comply with the requirement of the Court without violating truth, justice, the Statutes of Kentucky and the prior decisions of the same Court (*infra*, p. 47).

As the Statutes in Kentucky had provided for many

years prior to the filing of the petitions and still so provide under other Articles of the Revenue Act of 1906, that the occupants paying taxes were subrogated to the claim and lien of the Commonwealth against the true owner (*infra*, p. 232), the petitions called the attention of the Court to the fact of such payments by occupants with the hope that the Court might to the extent of such payments relieve the petitioner from again paying to the State such taxes as the petitioner would be still obliged to repay to the occupants who had been subrogated to the lien of the State. The information regarding such payments was not within the control of plaintiff in error but of the County Officers who were seeking to forfeit the petitioner's title.

The rulings of the Court of Appeals upon these petitions to list were made after construing this Article III as intended to "outlaw" these titles (Record, No. 223, fol. 166). The County officials showed the same zeal to effect the same intention. For instance, the "Answer of R. Blair, the duly elected, qualified and acting county attorney for Letcher County" "*denies that the said petitioner is the owner of or has any claim* right or title to either or any of said tracts of land" and "*denies that the said petitioner has any right whatever under the provisions of Article 3 . . . to have an order made by the Letcher County Court assessing said lands*" and "for further answer says":

"that if it should turn out that either of said tracts do lie within the county of Letcher, then, he says, that each and every portion thereof is held, owned and in the adverse possession of citizens of Letcher County and others who have title thereto deducible of record from the Commonwealth of Kentucky, and under and by virtue of such title they have held every part and parcel of said land to a well-defined and marked boundary and been in the occupancy and possession thereof for a period of more than five years, more than fifteen years, and for more than thirty years, next before the application was filed herein, claiming and holding every part and parcel of said lands to a well-defined and marked boundary against the claim of all persons whatsoever and against all the world."

"And he states that all claim, if ever there any existed, to any one by virtue of either of the grants re-

ferred to in the application, have long been barred and their right to entry tolled, under and by virtue of the statutes of repose in vogue in the state of Kentucky."

"Third: For further answer, he says that at the execution of the said alleged deed, or deeds, from Charles B. Hillhouse to the petitioner, on December 21st and December 24th, 1906, that all the lands within the bounds of Letcher County were in the actual, peaceable adverse possession of citizens and other persons occupying said lands, who claimed and held same under titles of record deducible from the Commonwealth of Kentucky to well-defined and marked boundary, holding and claiming same adversely to all the world, and he states that said deed, or deeds, if in fact made, were champertous, null and void and passed no title, right or claim whatsoever to the petitioner."

"Wherefore he prays that the application herein be dismissed and the prayer of the petitioner be denied, and he prays for all proper relief" (Record No. 223, fols. 23–25).

Even this Article III makes no provision for answers by County attorneys in opposition to offers of landowners to increase the revenues of the State, and this remarkable document, which reads like the answer of a defendant in an ejectment suit, is here quoted merely as one of the many indications that the County officials, as did afterwards the Court of Appeals, construed this Article III to intend not to increase the revenues of the State but to "outlaw" titles deemed to be obnoxious to the interests of the majority of the voters in that locality. This "answer" was not repeated by the attorneys for the other three counties; perhaps for "reasons of State." For, although the Court of Appeals has since declared that the purpose of the article to confiscate the property of plaintiff was "highly politic" (Record No. 223, fol. 189), yet the instigators of that article, who were in close touch with the county attorneys throughout these proceedings in both cases 223 and 224, may have thought it "highly impolitic" that that purpose should be needlessly disclosed. But in all other respects the opposition of the Commonwealth's attorneys in the other counties was quite as strenuous. All through these proceedings in the County and Circuit Courts the

County attorneys, who are generally supposed to have at heart the increase of the revenues of the County and State, fought "tooth and nail" to prevent the listing of these lands or the payment of taxes thereon by the plaintiff in error. Their efforts ceased only when these applications to list were out of these lower Courts and in the Court of Appeals where interests of the instigators were supposed to be safe in the hands of their own private counsel, who were heard in that as in all the other Courts.

The hearings in the County and Circuit Courts of the petitions to list.

Such of the counsel for plaintiff in error as appeared in the County Courts on the hearing of these applications to list, took their lives in their hands as was well known to residents of that locality. The facts stated in the Answer of the plaintiff in error in the later case No. 224, although the same could not then and there be proved because the Court sustained a demurrer to these allegations (Case No. 224, fol. 232), are nevertheless true, viz; that the instigators of Article III, there designated by name (Record No. 224, fols. 215, 216, 219), claiming by deeds from occupants adversely to the plaintiff in error, had caused to be brought to the court house an excited crowd of armed men for the express purpose of intimidating counsel of plaintiff in error, influencing the Court and preventing plaintiff in error from securing an assessment for taxation of the lands described in the petitions (*Id.*, *Ib.*), and to this end and with the intent and purpose of acquiring the title to the lands of the plaintiff in error, excited the citizens of these four counties by representations that plaintiff was about to eject from their homes all persons within the boundaries of the patents (*Id.* fol. 218-219); wherefore plaintiff in error prayed by cross-petition that such persons and corporations be made parties to the action as they and not the Commonwealth of Kentucky were the real "party in interest" in these proceedings attempting to forfeit the plaintiff's title (*Id.*, fols. 219-220).

But the Circuit Court on motion of these persons and corporations sustained a demurrer to this defense and cross-petition (Case, No. 224, fol. 232).

The offer of the plaintiff in error to pay taxes on all the lands. On the hearings of the petitions to list in the County Courts or Circuit Courts, counsel for plaintiff in error, produced and offered to read in evidence the assessors books and moved the Court to assess the total of acres listed by the plaintiff in error for assessment, viz; in Letcher County 55,020 acres at $1.00 per acre (Case, No. 223, fols. 31 and 34); in Floyd County, 88,415 acres at $1.00 per acre (*Id.* fol. 65), in Knott County, 20,058 3/4 acres at $1.00 per acre (*Id.*, fol. 59). In Pike County, pending the hearing on the motion to dismiss the petition to list, plaintiff in error in the Pike Circuit Court offered to list 275,236 acres claimed by it in Pike County and described in its petition "at the rate of one dollar per acre and to pay the taxes thereon assessed at said rate" (*Id.* fol. 114–115).

Thus it appears that the aggregate upon which the plaintiff in error thus offered to pay taxes was nearly 440,000 acres in the four Counties and the total amount nearly $44,000, although it was certain that much of this land had been lost to plaintiff by adverse possession. It was also shown in the petition for rehearing that although there was much land in these Counties not within the boundaries of the patents of plaintiff in error this sum so offered by the plaintiff in error was *more than the total annual income of all four of these Counties taken together, including therein the taxes paid by the enemies of plaintiff in error who claimed 200,000 acres of mineral rights underlying the surface for which they were seeking to forfeit and acquire the title of plaintiff in error* (Record No. 223, fols. 245-246).

The petitions furnished all the data needed to enable the Court to make the assessment and under the express terms of the Statute it was "the duty of the County Court" not of the plaintiff in error "to ascertain the amount of unpaid taxes" (*Id.*, fol. 141). But "the Court upon consideration of said offer overrules the same" (*Id.*, fols. 114–115).

Thus again, it is submitted, is shown that this Article III as construed by the Courts and enforced by the officials of the Commonwealth in the cases at bar, was not in-

tended to raise revenue and incidentally to "outlaw" titles, nor even to "outlaw" titles and incidentally to raise revenue, but solely to "outlaw" these titles.

The four county courts thereupon denied and dismissed the petitions to list without stating any reasons or pointing out any defects in the petitions (Letcher County, Record No. 223, fol. 26; Knott County, *Id.*, fol. 59; Floyd County, *Id.*, fol. 65; Pike County, *Id.*, fol. 114). Thereupon the plaintiff in error appealed to the Circuit Courts.

In the Circuit Courts, according to the terms of Article III the hearings on the petitions to list were to be had *de novo* (Record No. 223, fol. 142). But the Circuit Courts, like the County Courts of all four counties, dismissed the petitions to list. The reasons stated, and even the words used, are the same in all four counties, the formula for the judgments in all of these counties having been, apparently, drawn by the same hand. It is " that said petition and application is insufficient in that it does not comply with the mandatory provisions of said Article and for other good and sufficient reasons " (Pike County, Record No. 223, fol. 41; Floyd County, *Id.*, fol. 86; Letcher County, *Id.*, fol. 36; Knott County, *Id.*, fol. 41).

In none of these cases either in the County Courts or the Circuit Courts were the " mandatory provisions " pointed out by the Court, nor were the " other good and sufficient reasons " stated, nor was any opportunity given to amend the petitions. The Court of Appeals, however, has since held in a case already cited, that the Circuit Court had no power to allow amendment of the petitions, and stated also that even the County Court could not do so *after January 1, 1907, which was prior to the heariug in the County Court* (Commonwealth *v.* Gatliff, 116 S. W., 263, 265).

The hearing in the Court of Appeals. From the orders or judgments of the Circuit Courts of the four Counties, plaintiff thereupon appealed to the Court of Appeals of Kentucky.

On a preliminary motion to dismiss the appeals Counsel representing the instigators of Article III, already referred

to, appeared again and stated as among the matters "to be determined by the Court."

"Is Article III of the Act . . . within the legislative power as limited by the Constitution of the State of Kentucky and the Constitution of the United States?" (Record No. 223, fol. 134).

The Court advanced the causes for argument and all four appeals were heard together on the 20th and 21st days of November, 1907. The claim that the Article was constitutional was supported only by the private counsel employed by its instigators. The Attorney-General appeared personally in Court on the argument and also submitted a Brief in which he contended that Article III was unconstitutional and "desired that such be regarded as the position of the Commonwealth."

By consent of the Court however the above mentioned counsel for the instigators were heard and filed briefs, and many of the statements of fact and law in the subsequent opinion of the Court, which plaintiff in error claims to have been errors, seem to have been the consequence of the adoption by the Court of statements of these Counsel.

The Opinion of the Court of Appeals and the Petition for Rehearing.—The Opinion in this case No. 223 was delivered December 20, 1907, about a month after the argument. It is set forth in full in the record (No. 223, fols. 139–193). It is, for all purposes, a part of the record before this Court under the ruling in Kreiger *vs.* Shelby, in which this Court said:

> "The statutes of Kentucky require written opinions to be delivered by the Court of Appeals in all cases, and to be recorded by its Clerk. Code of Civ. Pro., Sec. 765; Gen. Stat., Ch. 28, Art. 2, Sec. 10; Chap. 16, Art. I, Sec. I. By the settled course of decision under the existing Judiciary Acts of the United States, this Court may examine opinions so delivered and recorded to ascertain the ground of the judgment of the State Court." (125 U. S., 39, citing many other decisions.)

The same statutes still exist in the same form. What was at the time of this decision, Gen. Stat., Ch. 28, Art. 2, Sec. 10, appears in the later editions; Ky. Stats. (Carroll, 1903), and Gen. Stats., Chap. 16, Art. 1, Sec. 1,

appears in Ky. Stats. (Carroll, 1903), Ch. 21, Sec. 372; Stats. of Ky. (Russell, 1909), Sec. 4800.

Even without these statutes the Opinion is evidence in this Court of the Federal rights set up and claimed by plaintiff in error.

San Josè Land, etc., Co. *v.* San José Ranch Co., 189 U. S., 186, and many cases there cited.

Plaintiff in error thereupon filed a petition for rehearing, which is in the record (No. 223, fols. 197–314), and contains an "Analysis of the Opinion." As the petition for rehearing was mainly an answer to statements in the Opinion of what the Court deemed to be the law and the facts, the Opinion and the petition for rehearing will be here considered together.

The Opinion is conveniently divisible into three parts, setting forth, respectively: (A) The grounds of the judicial divination of the legislative intention "to outlaw" these titles (Record No. 223, fols. 151–166); (B) the arguments by which the Court seeks to sustain this Article III against the objections that it is unconstitutional (*Id.*, 166–189); and (C) the grounds upon which the Court holds the petitions to list to be defective and sustains the dismissal and denial of the petitions (*Id.*, 189–193).

(A) After quoting the whole of Article III (Record, No. 223, fols. 139–151) the Court sets forth to "set out here so much history of the State as will disclose the evil sought to be remedied by this Act, in order that the legislative purpose may be more surely divined" (Record No. 223, fol. 151).

It must be assumed that the Court in thus seeking a divination of the legislative purpose regarded this Article III as ambiguous, for in a later case the same Court, the same judge writing, said: "Where an ambiguity exists, whether because of the uncertainty of meaning of the words employed, or because of an apparent conflict in statutes, or between a statute and the Constitution, then and then only, are the courts permitted to look beyond words of the particular statute as to the legislative purpose. Such methods of construction are always for the

sole purpose of arriving at the legislative intention (Commonwealth *v.* Internat. Harvester Co., 115 S. W., 703, at p. 707).

Thereupon the Court proceeds to specify in detail what it contends are facts that justify its conclusion that "there can be no doubt that the Legislature intended to outlaw these dormant titles" (Record No. 223, fol. 166), which statements of the Court were answered in the petition for rehearing by pointing out (1) that *the complexities and defects of the land laws of Virginia and Kentucky* (Record No. 223, fols. 151-156) were not the fault but a misfortune for the original patentees and those deriving title from them (*Id.*, fol. 198); (2) that *the Court's surmise that the separation of Kentucky from Virginia may have been delayed by the remote grantors of plaintiff in error* (*Id., fol. 153*) *seemed inconsistent* with the facts then already shown in the brief of the plaintiff in error on the hearing that many of these patentees were themselves pioneers and founders of the Commonwealth of Kentucky, members of its earliest constitutional conventions and legislatures, etc., (*Id.*, fol. 199); (3) that *the Court's opinion that the grants made over a century ago were for too large tracts of land*, and that the grantees were probably mere "speculators and adventurers" (*Id.*, fols. 152, 153, 156) were not grounds for forfeiture of title, and that a very great part of the land in Kentucky and adjoining states is now held under title derived from patents of quite as large tracts of land (*Id.*, fols. 200, 201); (4) *that the Court's opinion that the patentees paid "a mere pittance" for the lands* (*Id.*, fol. 158) did not apply to the patents under which plaintiff in error claimed title the consideration for which was generally "more than one and a half pounds current money" per acre, and that these patentees were injured by a later reduction in price to junior patentees (*Id.*, fols. 202-203); (5) *that the failure of prior legislatures to provide for transcribing the records* on the splitting up of old counties (*Id.*, fols. 155-156) was a condition not in Kentucky any different from that in other States generally (*Id.*, fol. 203); (6) *that the finding by the Court of a "moral right" in adverse occupants* (*against the*

legal right which the Court admitted was in the original patentees) (*Id.*, fol. 158) was generally irrelevant if applied to the real settlements in the "bottom" lands as to which adverse occupants had already acquired the legal right by adverse possession; and that if intended to apply to the wild lands which are the real objects of the attempted forfeiture, the same finding of "moral right" was not well founded since the occupants have neither enclosed nor cultivated them but seek to hold them under a claim of color of title originating under bogus "patents" issued against the positive prohibition of the Kentucky Statutes and for the most part only after rumors that a railroad was coming through this locality (*Id.*, fols. 204-205); (7) *that the Court's conclusion that the occupants were "innocent enough"* of knowledge that these lands were already owned by others (*Id.*, fol. 157) is contradicted both by the numerous previous attempts of representatives of the occupants in the legislature and constitutional conventions to relieve the occupants from what the Court calls the "incubus" (Record No. 223, fols. 162, 208) of the title of the true owners; and the same finding of innocence is also contradicted by the fact that for many years it has been unsafe for any one known to be claiming under a Virginia grant to go into these "unenclosed forests" for the purpose of locating the boundaries of his land (*Id.*, fols. 206–213); (8) *that the Court's condemnation of the true owners for failure to "develop, clear, tenant or work" the lands* (*Id.*, fol. 158) was unjust, as the true owners have been prevented by the violence of the occupants from approaching these lands, of which, as stated in a bulletin of the National Geological survey, "the valleys are narrow and steep walled . . . there is practically no level land except the narrow valley floors, *to which settlement is confined*"; and that the occupants of adjoining lands claiming these wild lands have done nothing with them, except in some cases to denude them of timber; that the lands are generally unfit for agriculture and could not be developed till the advent of a railroad, and that any tenant of a "Virginia Granter" might have been effectively "outlawed" by the occupants (*Id.*, 213-220); (9) *that the Court's condemnation of the true owners for an alleged*

failure "to add to the State's strength and stability in peace or war" (*Id.*, fol. 158) is without any evidence to support it; is contradicted by history which shows that some of the patentees defended the earliest settlements against the Indians and one of them was one of the earliest Governors of Kentucky, and by other facts, and would not, if true, be a ground for forfeiting their title (*Id.*, fols. 219–221; (10) and (11) *that the Court's condemnation of the true owners for alleged failure "to respond to the imperative command of the law" i. e.*, to pay taxes (*Id.*, fol. 165) disregards the fact that the Commonwealth has never protected the true owners so that they might safely enjoy their property and the long existing and still existing Statutes of Kentucky which subrogate the occupant who pays a tax on the land, to the claim and lien of the State against the true owner (*Id.*, fol. 221). It appears in the record of Case No. 224 by the testimony of County officials hereinafter referred to that taxes on all or almost all these lands have been paid by occupants or by those claiming to be so and which Article III seeks to recognize as such "under claim or color of title from any source whatever" (*Id.*, fol. 221–223); (12) *that the Court's statement of alleged similar conditions in Virginia and West Virginia and alleged success of confiscation there* (*Id.*, fols. 163–165) are entirely wrong and probably the result of relying upon the unsupported statements of counsel for enemies of the plaintiff in error whom the Court allowed to be heard on the argument of the appeal (*Id.*, fols. 223-232).

To all of these statements of the Court, the petition for rehearing also pleaded that the alleged grounds of the Court's divination, even if true, would not justify an intention by the Legislature to "outlaw," *i. e.*, confiscate, the titles of plaintiff in error, and still less would they make valid an enactment to effect such an intention; that the attempted confiscation, and the interpretation by the Court of the Kentucky Statutes as intending such "outlawing" or confiscation was based partly on alleged faults which, if faults at all, were faults neither of plaintiff in error or its immediate grantor, but of its remote grantors or of the Commonwealth of Kentucky or its officials; and

that an attempt to punish the plaintiff in error for any of these alleged faults, would not be just; and to carry that attempt to the point of confiscating or "outlawing" the titles to its lands would not be due process of law under whatever form attempted (Record No. 223, fols. 232–258).

(B) After reaching the already quoted conclusion that the Legislature intended to "outlaw" the titles of plaintiff in error, "*and thereby protect the treasury and increase the State's revenues*" (*Id.*, fol. 166), the Court adds: "Nor can there be any doubt that the legislative purpose was to proceed carefully and in that manner that would satisfy the requirements of the Constitution of the State and of the United States" (*Id., Ib.*).

Thereupon the Court proceeds to consider some of the objections that had been raised by plaintiff in error to the constitutionality of the Act (*Id.*, fols. 169–189). After deciding that the appeal was properly before it, the Court says:

> "The constitutionality of the Act is questioned by appellant. The question must be decided; as if it is unconstitutional the appellant would have had the right to list its lands under other provisions relating to the assessment of omitted property" (Record, No. 223, fol. 169).

Then after disposing of some objections, exclusively relating to the Constitution of Kentucky (*Id.*, fols. 169–175), the Court overrules all the objections that Article III violates the National Constitution, and holds (1) *that it does not violate the Virginia Compact* (*Id.*, fols. 175–180), answered in the petition for reargument (*Id.*, fols. 261-262), and more fully in this argument (*infra*, p. 96); (2) that it does not extort unconstitutionally *an unlawful duplicate* tax (*Id.*, 180–184); answered in the petition for reargument (*Id.*, fols. 262–272), and more fully in this argument (*infra*, p. 227); (3) that it does not *deny due process and equal protection of the law* (*Id.*, fols. 184–187); answered by the petition for rehearing (*Id.*, fols. 272–279), and more fully by this argument (p. 189, *infra*); (4) that it does not *violate the National Constitution as an ex post facto law* (*Id.*, fol. 187); answered in the petition for rehearing (*Id.*, fols. 279–294), and more fully in this argu-

ment (*infra*, p. 74); (5) that it is not *unconstitutional as an "act of spoliation and lawless confiscation, revolutionary and subversive of all orderly and constitutional government"* (*Id.*, fols. 188–189); answered by the petition for reargument (*Id.*, fols. 295–305), and more fully in this argument (p. 308, *infra*).

(C) At last after disposing of the constitutional questions in a way seeking to show that the petitioner's property was already forfeited and confiscated, unless the petitions to list should be sustained, the Court comes to the question,

> "Finally. Did Appellant comply with the Statute so that the County Court ought to have listed the lands?" (*Id.*, fol. 189).

On this question, after reviewing some of the allegations of the petitions to list, the Court concludes:

> "The defects of these petitions are, 1st, they do not disclose the names of the owners, and therefore do not show the proper persons to be assessed; they show that the appellant is only 'an owner,' of what or in what proportions and by whom the remaining portions are owned is not shown. 2nd. They do not so describe the land proposed to be assessed, as that in the language of the statute 'it can be identified'; the land to be assessed is not only specific tracts so described in their entirety as to be susceptible of accurate location, but the interest of the listing owner, if he owns less than the entire tract, must be so described that it may be identified. 3rd. Some of the patent boundaries lie only partly in the County where it is proposed to list it. The petitions show that fact, but do not show where, in what part of the County, the parts to be assessed do lie; nor do they show where the excluded parts which it is admitted do not belong to the petitioner do lie so that the Court could with reasonable certainty and intelligence fix a valuation on that part which is assessed" (Record No. 223, fols. 190–191).

These statements of what the Court held to be defects in the petitions to list were answered in the petition for rehearing as follows:

> "First, the statute does not require the petition to state the names of owners of the remaining portions of (or interest in) the tracts; second, the statute directs that 'the land,' not the listing owner's interest in it,

shall be listed; third, the place in the county where the land lies is necessarily shown, because, as even the Court admits, the descriptions are 'by calls and distances, which it may be assumed were sufficiently explicit to have located the several boundaries' (Record No. 223, fol. 189) and to these descriptions, for greater certainty and definiteness, are appended statements, showing how and on which side they are bounded by other designated tracts described in the petitions or by the County line, when the County line is one of the boundaries."

"All these tracts adjoin each other and a plat can easily be drawn of the whole of them in their relative positions, and as some of the descriptions refer to natural monuments each and all of the tracts can thus be located. *There are no excluded parts*, except parts of the *surface*, and the land under the surface is not excepted in any case. These excepted parts of the surface could not have been accurately determined unless the petitioner had been given much more time than was allowed by the statute to determine the rights of those claiming by adverse possession, and, perhaps, unless also the Commonwealth had furnished a large police force or the militia of the Commonwealth to protect surveyors, &c., needed to determine such parts to be excepted" (Record No. 223, fols. 306–307).

It is respectfully submitted that the conclusion of the Court denies due process and equal protection of the laws in that

(I) *The Court injects into the petitions something that was not there*, when it treats the statement that plaintiff in error is "an owner" as equivalent to saying that it is owner only of an interest in common with others and to be assessed only on a part of the land claimed under its muniments of title. The petitions to list were drawn with the belief of Counsel that any claimant of an interest in these lands under the earliest patents must list and pay taxes on all the land not lost by adverse possession.

These petitions do not state that there are any owners in privity with the plaintiff in error, and it would seem, although the Opinion seems to be somewhat ambiguous, that it must be to such co-owners in privity that the Court refers, and not to adverse claimants of parts of the land, because the Court complains of the lack of statement of

"in what proportions" the other owners own, which could be only in case of owners in privity with petitioner, and declares that the "interest" of the listing owner must be identified. It seems also necessary to assume that the Court here referred to owners in privity with the petitioner, so as not to stultify the Court by the assumption that it is stating "Firstly" and "Secondly" as separate objections merely what is stated in another form in the third and last. The Court states why the things (omitted from the petition, but it is submitted, not required by the Act) are, in the Court's estimation, needed for the purposes of a revenue act (Record No. 223, fols. 189–193). But no one is bound to conform to requirements that the Court thinks ought to have been contained in an act, if not actually contained therein, and this is of course especially true of a forfeiting act which, according to all the canons of construction, must be construed with the greatest strictness.

(2) *The Court adds to this Article III a requirement that is not there* when it dismisses the petitions to list for an alleged failure to state "the names of the owners" other than petitioner. Article III directs that "the land sought to be charged," not the listing owner's interest in it, shall be listed (Record No. 223, fol. 140). The prior Statutes of Kentucky and the the re-enactments in other Articles of this same Act of 1906, make no provision for listing an undivided interest, but do provide for a remedy over against his co-owners after partition by one joint owner who has listed and is assessed for land owned in common with others (Gen. Stats., (Bul. & Fel.) 1887, p. 1090; Ky. Stats., Carroll Ed'n, 1903, Section 4035; Russell's Ed'n, 1909, Section 5927).

(3) *The Court in order to forfeit the title applies ex post facto a new rule* that is contrary not only to the Statutes of Kentucky, as construed by the same Court but also of the States generally, including West Virginia, when it requires that the plaintiff in error should have listed an undivided interest instead of the land. The payment by a tenant in common of one undivided fourth of a tract of land, of one-fourth of the taxes and damages,

when the whole tract has been returned delinquent for the non-payment of taxes will not prevent forfeiture of the entire tract of land or any part thereof (Smith *v.* Tharp, 17 W. Va., 221).

"It was not then, and is not now, the policy of the State to tax mere undivided interests or particular estates in land" (State *v.* King (W. Va.), 63 S. E., 472. The assessor need not ascertain and assess to joint owners their respective interests in the property (Meyer *v.* Dubuque County, 49 Iowa, 193). Kansas Statutes, 1868, Sec. 32, &c., requiring that in the assessment of land "each parcel" must be separately listed, held that an undivided interest in land could not be legally assessed (Corbin *v.* Inslee, 24 Kan., 154).

As a general rule taxes are imposed upon the owner or person in possession of real estate, as a whole or as one entire interest without reference to particular estates or interests in the property. The land being charged with the taxes all claims and pretensions must yield to such charge, and all persons must take notice (25 A. & Eng. Encyc. of L., 1st ed., pp. 121–123, citing many cases in many States).

(4) *The Court contradicts or overrules its own prior decisions or opinions, and disregards provisions of Article III as well as provisions of other Articles of the same act of 1906* when it says that "The State is interested not only in having its taxes paid to it but in having them paid by the persons who ought to pay them" (Record No. 223, fol. 184); for the same Court had said a few years earlier (construing sections of the tax laws that have been re-enacted without change in this Revenue Act of 1906, of which Article III purports to be a part): "The object was to insure that the property paid the tax once; *it was not deemed material to the State which of those made responsible for it paid it*" (Commonwealth *v.* Ingalls, 28 Ky. L. R., 166, citing Commonwealth *v.* Gaines, 80 Ky., 489, in which case the same Court had said:

"The words 'owner' and 'possessor' and 'owning' or 'possessing' are not used in the statute as synonymous terms, as contended by the ingenious counsel for

appellees." . . . "'possessor' relates to the person who has the property of himself or others in hand or keeping, or under physical control, and *such possession may exist with or without title*" (Commonwealth *v.* Gaines, 80 Ky. Rep., p. 494).

The Court in its opinion in the case at bar seems also not to agree with the legislature respecting the interests of the Commonwealth for the legislature by statutes in force at all the period of five years when the alleged arrears in question "ought to have been paid," expressly provided that the owner or occupant must pay, but *as between themselves* the owner shall be liable (*infra*, p. 231).

Confronted with these statutes and its own prior decisions, the Court has been forced to take refuge in an assertion that in these cases there was a privity of title (Record No. 224, fol. 344), and that Article III intends to tax titles not land, but this notion seems to be imported from West Virginia for the occasion and attempted to be applied *ex post facto* and is inconsistent with the above decisions of the same court, and with the provisions of other articles of the same statute re-enacting the prior law and expressly declaring that the land shall be assessed without reference to conflicting title, and the tax shall be paid by either the legal owner, the equitable owner or the occupant (*infra*, p. 231), and the Constitution and Statutes of Kentucky require that taxes shall be uniform (*infra*, p. 230).

The Court's rigor in its requirements for definiteness of description purports to be based on the ground, among others, that the assessment would follow the description of the petition to list and that if the assessment were ineffectual for indefiniteness of description "the proceedings to forfeit would fall by the way" (Record No. 223, fol. 192) but later, in case No. 224, the same Court sustained a declaration of forfeiture of these same lands, where the descriptions in the petitions to forfeit were less definite than those in the petitions to list except that there was no disclaimer of parts of the surface not owned by the the plaintiff in error (*supra*, p. 60); a disclaimer which as hereinafter shown was necessary in order not to violate truth, justice and the law (*infra*, p. 47); and a few months before this last mentioned decision, the same

Court in another case had overruled the demurer of a land owner who objected that the petition to forfeit "fails to disclose what parts if any of the land described in the petition is held by occupants who have paid taxes thereon for the five years preceding the judgment of forfeiture and that the judgment is erroneous because it does not segregate the parts to which the forfeited title would inure;" and in overruling the objection the Court expressly says that "It is not necessary for the petition to describe more than the tract of land the title to which is sought to be forfeited . . . We have no hesitancy therefore in holding that it is not necessary for the judgment to ascertain and describe the parts held by occupants (Kentucky Union Co. *v.* Commonwealth; 33 Ky. L. Repr. at pp. 11 and 12).

In other words, *consistently* supporting the alleged legislative intent to "outlaw" the ancient titles, in two approximately contemporaneous proceedings under the same law, the same Court, in order to effect forfeiture, has *inconsistently* held, according to the exigencies of the situation, that the omission of a detailed description of adverse occupancy—(*a*) in the voluntary petition of a landowner for permission to pay taxes, *is a fatal defect;* (*b*) in the petition of the State in the exceedingly technical forfeiture proceeding, *is immaterial.*

(5) *The Court requires under pain of forfeiture that plaintiff in error shall make under oath a claim contrary to justice and against the Statutes of Kentucky and the prior decisions of that Court.* It might seem from a hasty reading of this opinion that the objection of the Court would have been met if the plaintiff in error had had the opportunity without bloodshed to make surveys and had designated by metes and bounds the parts of the surface not owned or claimed by plaintiff in error because the same had been lost by adverse possession. Such a conclusion might be hastily drawn from statements in the opinion and from the Court's ending the opinion with a reproof to the plaintiff in error for offering a plea of excuse for its failure to discover the limits of the parts lost by adverse possession (Record No. 223, fol. 193, *infra*, p. 55). But it has since appeared that the investigation,

which here the Court reproves the plaintiff in error for not having made, would have been of no avail if made, although the Court did not deem it necessary so to decide in the case at bar, in order to forfeit the property of plaintiff. For unless the Court has since changed its construction of Article III that article requires under pain of confiscation that the owner claiming under a patent shall list and pay taxes on all the land described in the patent under which he claims, whether or not it is certain that he has no title to part because of adverse claims, *i. e.*, he must pay full taxes on all the land described in his muniment of title, although it is certain that he does not own all and describes exactly what he does not own within the boundaries. On failure to list and pay on all that he does not own he must lose all that he does own. This is one of the many ways in which the Court of Appeals has sought to extend the principles of the West Virginia laws which of course have no such feature (*infra*, p. 214). The ruling was made at the term next following that in which the Court had affirmed the declaration of forfeiture in Case No. 224 and related to lands in a neighboring County (Leslie), where it appeared that the Circuit Court had permitted the unhappy owner to file an amended petition to list, in which as the Court of Appeals itself says, "it appears that he had eliminated all that portion of his various boundaries which conflicted with what he conceived to be better titles" (Commonwealth *v.* Gatliff, 116 S. W., at p. 265). He offered to list and pay taxes on the part not so eliminated, which offer the Circuit Court accepted (*Id.*, *Ib.*). But the Court of Appeals, the same Judge writing who wrote the Opinion now under review in Case No. 223, reversed the judgment of the Circuit Court, again citing the provision already referred to (*supra*, p. 6), which the instigators of Article III had inserted in that Article (but without however again erroneously stating that such a provision had existed in prior Statutes) and held that the restriction of the number of acres to be listed to a less amount than that stated in the patents, because prior patents rendered such title invalid for part, was forbidden, as the Statute "by clear implication, if

not by express negation, forbids it when it excludes the fact that any other person has listed or paid taxes on the land, or any part of it, from releasing the claimant now offering to list it from full liability for taxes upon it" (Commonwealth *v.* Gatliff, 116 S. W., at p. 265); and the Court also there holds that

> "It was the duty of the claimant to list his title whether good or bad; that it was his title or claim such as it was that was aimed at by the Act to be taxed; and that his *omission or exclusion of parts of his boundary* was a violation of the Act and failed to bring him within its saving provisions. The petition in this case is subject to all the vice differing only in degree, that the petition in the case cited (Eastern Ky. Coal Lands Corporation *v.* Commonwealth, 106 S. W., 260; 32 Ky. Law Rep., 129) was subject to. Neither the petition nor the amendments were a sufficient compliance with the Act and should have been dismissed," and also holds that any amendment of the petition by the Circuit Court was too late and that neither the County Court nor Circuit Court could accept a petition after January 1, 1907 (*Id.*, *Ib.*).

So that it seems from the latest decision of the Court of Appeals that even if the petitions had exactly described the parts of surface disclaimed, the petitions of plaintiff in error would have been held defective for failure to claim *all* the surface of the land within the boundaries of the patents if this ruling had been needed to forfeit the title, although the Court knew and any one else having any knowledge of the condition in this locality knows, that there is much land in the "bottoms" included within these patents that has been fenced and cultivated for many more years than sufficient to bar the title of the patentees. Such a claim, it is respectfully submitted, would have been contrary to justice and fairness, contrary to law and contrary to prior decisions of the Court of Appeals.

Under the Statutes of Kentucky and the decisions of the Court of Appeals an actual adverse possession of fifteen years under the requisite conditions not merely tolls and bars the remedy of the true owner, but transfers the title to the occupant, and gives him a right of entry. Botts *vs.* Shields, 13 Ky. (3 Litt.), 32, 34; Chiles *v.* Jones,

34 *Id.* (4 Dana), 482; McCracken County *v.* Mercantil T. Co., 84 Ky., 344; Sutton *v.* Pollard, 96 Ky., 640; 16 Ky. L. R., 685; 29 S. W., 637; Pollock *v.* Maysville & B. S. R. Co., 103 Ky., 84; 19 Ky. L. R., 1717; 44 S. W., 359.

It would have been, of course, simple and easy to have claimed in the petitions to list, all the lands within the boundaries of the patents; but the officers of the plaintiff in error could not honestly nor truly verify a petition making such a claim, for they knew with absolute certainty, as do the Judges of the Court of Appeals and every one else having a knowledge of the locality, that parts of the land had been lost to the true owners by adverse possession of occupants. Indeed, so baseless a claim might have been made by the Court a ground for dismissing the petitions for dishonesty or perjury.

But these officers also knew that the mineral interests in most of the land in the unsettled portions had been conveyed by the occupants to the enemies of the plaintiff in error, who had procured the enactment of this Article III, and they did not know whether title by adverse possession had been acquired to any of these mineral rights at the time of the deeds of such rights, and as they claimed that no title to the mineral rights could have been subsequently acquired by the grantors continuing to possess the surface, and grantees of merely mineral interests are required to list such interests separately for taxation.

By a deed of minerals reserving the surface, the two estates are severed and should be separately taxed (Stuart, Trustee, *vs.* Commonwealth, 94 Ky., 595; 15 Ky. L. R., 513; 23 S. W., 367; Carter *v.* Estep, 30 Ky. L. R., 1144; Kincaid *vs.* McGowan, 88 Ky., 91 (4 S. W., 802); 9 Ky. L. R., 987; Baker *vs.* Royal, etc., Co., 32 Ky. L. R., 982; Virginia C. & I. Co. *v.* Kelley, 93 Va., 332; 24 S. E., 1020; Low *v.* Lincoln Co. Ct., 27 W. Va., 785; U. S. Coal, etc., Co. *v.* Randolph Co. Ct., 38 *Id.*, 201; 18 S. E., 566; Consolidated Coal Co. *v.* Baker, 135 Ills., 545; 26 N. E., 65).

"The possession of the surface of a tract of land by putting a tenant thereon is not an actual possession of the mineral rights thereof within the champerty statute." Syllabus in Combs *v.* Virginia Iron, Coal and Coke Co.,

32 Ky. L. R., 601; (Ky. Ct. App., 1908, citing White on Mines and Mining, Section 436; Armstrong *v.* Caldwell, 63 Pa., 284); S. P., Price *v.* Big Sandy Co. (32 Ky. L. R., 969).

"Each estate may be occupied, conveyed, incumbered, sold by the Sheriff, or allotted in partition, without any effect upon the offer. If a trespasser enters either estate and maintains possession, he can acquire title by the statute of limitations, after twenty-one years, to so much as he has actually held for that length of time; but his title will not extend above or below the estate on which he enters. If he would acquire any part of the mineral he must make his entry upon and maintain his position within the limits of the mineral estate for the requisite period of time in an open, notorious, exclusive and continuous manner. . . . The intruder must keep his flag flying in a visible and hostile manner. . . . There is no allegation in the pleadings that would even tend to show that appellee had been *operating* the mine, or had *taken possession* of the *mine* or any *portion of the mineral beneath the surface*, and, *therefore, there has been no adverse holding* on the part of appellee or its predecessors that would affect appellant's interest" (Baker *v.* Royal Lead & Spar Co., 32 Ky. L. R., 987).

"Adverse possession of the surface of and for the statutory period does not carry with it the possession of minerals below it, where the title to the latter has been severed from that of the surface by deed; and the owner seeking to establish title to a mine must prove possession of the mine as such, independently of his possession of the surface" (Am. & Eng. Encyc. of Law (1st ed.), Vol. I, p. 296, note).

"The Statute of Limitations, for want of adverse possession, does not apply in favor of one claiming coal in a state of nature in place not developed" (Syllabus by the Court). (1906, Supreme Ct. of App. of West Va., Newman *vs.* Newman, 55 S. E. Rep., 377; citing Wallace *vs.* Elm Grove, 52 S. E. Rep'r., 485).

Hence the petitioner disclaimed title to so much of the *surface only* as had been lost by adverse possession.

It was thought by many at the time of the hearing in the County Courts that those of the counsel for plaintiff in error who attended the hearings in the County Courts of Pike and Floyd Counties had about an even chance of coming out of the court room alive. If the petitions to list had claimed the surface of all the land, as the Court of Appeals afterwards said should have been done, this statement would have lent countenance to the statements of the enemies of the plaintiff in error that it was intended to deprive occupants of their homes, and this might have been enough to turn the scales in favor of murder.

Article III requires the petition to list to be verified. So that (again it is respectfully submitted) the construction by the Court of Appeals of this Article III finally reduces to this: *the title of the true owners of land is forfeited for failing to make under oath a claim contrary to truth, contrary to fairness and justice, and contrary to the Statutes of Kentucky and the prior decisions of the same Court.*

(6) *The Court discriminates unlawfully against the plaintiff in error* in refusing to the petitioner the protection extended to a co-defendant in the same cause, one Twyman, resident of Kentucky, whose answer appears in the Record (No. 224, fols. 173–183) as to whom the Court reversed the forfeiture while sustaining it as to the plaintiff in error, and in doing so said: "In argument it was admitted by Appellee that the lower court erred in sustaining a demurrer to the answer of Twyman. . . . *So far as his petition disclosed, he was the owner of the entire tract which he sought to list*, and not merely such parts thereof *as were not owned by others.* His petition was unlike that of the Appellant Eastern Kentucky Coal Lands Corporation. He was seeking to avail himself of the provisions of the Act, and had done all that could be reasonably required of him" (Record No. 224, fols. 344-345)."

This statement of the Court that "*so far as his petition disclosed he was the owner of the entire tract*" is contradicted by the terms of the petition, which is part of

the record now before this Court, and which expressly states that he is only one of an undesignated number of co-owners, and claimed only a part, not designated in quantity, of an undivided eighteenth owned by the heirs of George Twyman, one of the descendants of Reuben Twyman, who himself owned only one-third (Record No. 224, fols. 173–174) and that the petitioner and the other unnamed heirs of Reuben are the owners and entitled to "*an undivided interest*" (amount not stated) of the tract (fol. 176). On the other hand, as already shown, the plaintiff in error does not state that it has any co-owners, (*supra*, p. 43) but the Court injects such a statement into the petition of the plaintiff in error and then states as a reason for dismissing, that the petition shows that plaintiff in error owned only an undivided interest in the tract (*supra*, p. 44) so that in brief, *the Court releases Twyman from forfeiture on the ground that his petition does not show a fact which he expressly states and forfeits the title of plaintiff in error on the ground that its petition shows the same fact when, in truth, it does not.*

Again, the Court saves Twyman on the ground that "he had done all that could be *reasonably* required of him" (Record No. 224, fol. 345) although he not only failed to list his land or even to describe his interest therein but also, as the Court itself says, failed to appeal from the judgment of the County Court dismissing his petition (Record No. 224, fol. 342); and although by the very terms of Article III his right to so appeal expired at the end of thirty days, and by so appealing he would have had the right to a hearing *de novo* in the Circuit Court (Record No. 223, fols. 141–142). On the other hand, the Court affirms the judgment forfeiting the title of plaintiff in error on the ground that it had failed to comply with the requirements of Article III and expressly approves and adheres to the former Opinion in case No. 223 (Record No. 224, fol. 343) in which, in order to dismiss the petitions to list of plaintiff in error, the Court rules that *the interest of the listing owner*, if he owns less than the entire tract must be so described as that it may be identified (*supra*, p. 44); and Twyman as his petition shows on its face had not complied with this requirement.

All this seems to be pretty bad, but it is not all.

The petitions of plaintiff in error more nearly and fully comply with the rulings of the Court than does the petition of Twyman with the sole exception that Twyman does not, like the plaintiff in error, disclaim title to the improvements and parts of the surface to which title had been acquired by adverse possession. This disclaimer, as already shown, was necessary in order to avoid making under oath a claim contrary to truth, contrary to justice and contrary to the Statutes of Kentucky and the prior decisions of that Court (*supra*, p. 47); and a failure to make such disclaimer might have been the occasion of murder (*Id.*, p. 47); and such a claim would have been based upon assumptions that the Court judicially knew were not true, for the Court has elsewhere stated that it judicially knows that similar lands are adversely occupied (*infra*, p. 18). It must therefore know that part of the land so occupied is lost to the former owner. Yet the interest claimed by Twyman is a part of one of the tracts that plaintiff in error sought to list. The Court therefore in effect holds that Twyman is released from forfeiture because he did not state what the Court knows is true, *i. e.*, that part of the land within the boundaries of his muniment of title are not owned by him or those in privity with him, and forfeits the title of plaintiff in error for not claiming to own what the Court knows is owned by others.

"The Appellee" referred to in the foregoing portion of the opinion as having conceded the validity of Twyman's defence was ostensibly the Commonwealth, but was really represented at the hearing by attorneys employed by the instigators already referred to, who, under the mask of the Commonwealth throughout these proceedings, have appeared in the Courts to enforce against the plaintiff in error this Article which the real representative of the Commonwealth, the Attorney General, had declared was in his opinion unconstitutional (*supra*, p. 4). But a ruling in favor of Twyman, who claimed for himself and associates only a small fraction of one out of twenty-one tracts claimed by plaintiff in error, would be of small practical consequence to the instigators of Article III and of the

attempted forfeiture thereunder, and would diminish the opposition to that Article; for Twyman was represented by able counsel, residents of Kentucky, who appeared at the hearing by consent of the Attorney General whose name was printed with theirs on their brief submitted to the Court of Appeals on the hearing by that Court of the appeal by the plaintiff in error. The freeing of Twyman (who owned only at most a few hundred acres) from the snare of Article III was also perhaps supposed to be worth far more than cost to its instigators by offering for the unscrutinizing eye a factitious aspect of equity and impartiality to rulings of the Court that, on closer inspection, it is respectively submitted, prove to be the outcome of a grossly unfair discrimination.

The last words of the Opinion state that "It does not answer to say the taxpayer did not know his property or its description. He is required to know it and to furnish it so as the property may be certainly identified from it; nor is it an answer to say that it would be too expensive for him to make the necessary investigation" (Record No. 223, fol. 193).

This statement leaves the reader to infer that the lands were not described so as to be identified although the Court elsewhere admits that the descriptions were "sufficiently explicit to locate the several boundaries" (Record No. 223, fol. 189), and the only objection was to exclusion of parts of the surface; and also leaves the reader to infer that the only ground urged for failure to comply with the Court's requirements before those requirements were stated, was because of expense. But the plaintiff in error had pleaded lack of time between the date of the enactment of Article III and the date required for filing the petitions, and had also pleaded that the necessary surveys to show the excluded parts could not be made without bloodshed if at all; which facts must have been known to the Court which stated, a few months later (in another case of the same kind relating to lands in a neighboring County), "that the Court judicially knows and it was admitted in argument, that practically if not quite all the land described in the petition is adversely held by occupants under claim or color of

title" (*supra*, p. 18), and it later appeared by the depositions of the Commonwealth's witnesses that taxes on all or almost all these lands had been paid by claimants adverse to the plaintiff in error (*supra*, p. 69); and the conditions of violence that for many years have existed in this locality have became notorious, through the press, throughout the United States; and as was pointed out to the Court in the brief of plaintiff in error submitted to the Court on the hearing before this Opinion was delivered and again referred to in the petition of rehearing (Record No. 223, fol. 211) it appeared from the records of the Court of Appeals itself that only a few years earlier (*i. e.*, in 1903), the Court had released a party from a contract to survey *lands in this same Pike County, and part of which are included in those claimed in the petition to list of plaintiff in error, on the ground that it appeared in evidence that two corps of surveyors had been unable to complete the survey, and that "persons residing within "the exterior lines of the patent, in actual possession and "claiming title thereto, were hostile and threatening "and by threats and hostile demonstration, by force and "arms, alarmed and intimidated and drove the surveying "parties from the land."* The lower Court ordered specific performance of the contract, but the Court of Appeals excused from performance on the ground that "*it would "probably result in loss of life or bloodshed. . . . The "resistance made by occupying claimants to a survey "of the land is a circumstance which so affects the ap-"pellant that he could not perform*" (Williamson *v.* Dills, Ex'tx., 24 Ky. L. R., 1792); and the judge who wrote the Opinion now under review in Case No. 223 was a native and resident of this section of the State, elected, and since this Opinion was delivered re-elected, to his high office to represent that judicial district of the Commonwealth, and hence must have been unusually familiar with the state of things there long existing.

But the Court ignores the plea of the violence and threats of the occupants, which would have prevented a survey before making the petitions to list, as it also ignored later the plea in the answer of the plaintiff in error in Case No. 224 setting forth the appearance of a

threatening crowd even in the Court House on the hearing of the petitions to list (*supra*, p. 62).

In Fremont *vs.* United States, this Court, speaking by Mr. Chief Justice Taney, in excusing a grantee from performance of conditions required by his grant, said: "The land being a wilderness, bordered by dangerous neighbors, the disorders of the times made it impossible to take possession and obtain a survey." Head-note, 17 How., 442.

Moreover the petitions did give the entire boundaries of the tracts under which plaintiff in error claimed title—so that the County Court had before it all the data for making the assessment. It was merely necessary to disregard the disclaimer of ownership of parts of the surface owned by others by adverse possession. By the express mandate of Article III it was the duty of the County Court, and not the duty of plaintiff in error, to make the assessment. The law is mandatory and says "the ascertainment of the amount of taxes unpaid and the assessments required *shall be* made by the County Court," etc. The obvious intention of the law is that whenever a *bona fide* application is made by petition, there *shall* be an assessment made by the Court provided any taxes are found to be due. The amount of the assessment is entirely another matter. An offer having been made to pay on the whole acreage, disregarding the exceptions, showed conclusively that the petitioner was attempting in good faith to have its land assessed under the law, so that it could pay the tax to the State; and surely no stricter rule can be applied to this petition, which is an instrument relating to land than is applied to a grant of land; namely, that if a grant contains exceptions and they are uncertain, the grant is good, but the exceptions are void.

There is no doubt that the grants described in the petition can be located, and that the location of the same is well known, and if the Court did not see fit to order a survey, or did not wish to assess an unknown part of same, then (if Article III were valid) the Court should have ordered that the petitioner pay on the whole acreage claimed, and should have fixed the assessment accord-

ingly. Where exceptions are void for indefiniteness a deed is not thereby made void, but the exceptions are disregarded (10 B. M., 145; 5 Mon., 159; 11 Pet., 557; Viners Abridgt., Vol. I, p. 250).

It was the duty of both the County and Circuit Courts, as assessing officers, to disclose to the plaintiff in error what were claimed to be the defects in the petitions, so as to afford an opportunity for amendment, and to seek such further information as would enable the Courts to do their plain duty.

Article III provides for forfeiture in the case where the owner or claimant has failed in his duty, but this is necessarily predicated upon the State officials having done their duty.

Referring to the Constitution of West Virginia, this Court, by Mr. Justice Harlan, in King *vs.* Mullins (171 U. S., 404), said:

> "*If the landowner does all that is reasonably in his power to have his lands entered upon the land books and to cause himself to be charged with taxes thereon, no forfeiture can arise from the owner not having been charged on such books with the state tax.*"

At the hearing before the County Courts the plaintiff in error offered to pay taxes on the entire land owned and not owned by it a sum greater than the annual tax of all the land in all four counties (*supra*, p. 34), If the amount was not right it was the duty of the County Courts, not the duty of plaintiff in error, to determine the true amount.

A lawful tender is equivalent to actual payment, and makes every subsequent step of the State officers for collection void (Poindexter *v.* Greenhow, 114 U. S., 270; Royall *v.* Virginia, 116 U. S., 572). In case of dereliction of duty by officers of a State, whereby owner was kept in ignorance of the sales, held, he was excused for failure to redeem within the statutory period (Martin *v.* Barbour, 140 U. S., 634).

The cases hereinabove cited are, it is believed, all the decisions that have as yet been reported of the Court of Appeals under this Article III. So far the Court of Appeals has "outlawed" or held to be confiscated all the

titles of all the parties who have sought to comply with the terms of Article III, save the claimant Twyman, claimant of a few hundred acres, in whose favor unfair discrimination was made (*supra*, p. 52), and one other who was excused, although it was proved that for years he had been doing almost the very thing which the Court made a ground for forfeiting the title of plaintiff in error (*i. e., listing only so much as he estimated remained of his lands after deducting what he estimated belonged to others by adverse possession or otherwise* (1909, Lockard, *v.* Commonwealth, 118 S. W., p. 331). This is another instance of discrimination.

It is not surprising that the Court itself finds the occasion calls for its assurance, viz.: "Nor are these objections merely technical, interposed whimsically so as to defeat the proposed listing of the land, and so as to work its forfeiture" (Record No. 223, fol. 191); but the facts, it is respectfully submitted, cry out against the assurance.

Even if the contentions of the Court had been well founded, yet it is respectfully submitted that since all the property of the plaintiff in error was supposed by the Court to be at stake, it still remains true as stated in the petition for hearing, that

> "In any event, the appellant should have been given an opportunity to amend after the alleged defects had been definitely declared by the Court.
>
> "The rigor of the Court's requirements would seem more appropriate to an examination on an application to be exempted from paying taxes rather than on an application to pay taxes which the applicant did not owe" (Record No. 223, fol. 307); and that "if there are any defects in the petitions they are not defects that the appellant refused to remedy. They were never pointed out, and the appellant was not given an opportunity to amend.
>
> "But it is useless to discuss this further. The Court's attitude like that of the local Courts, seems to be the result of the conclusion that the Legislature intended that these titles should be 'outlawed' instead of being taxed" (*Id.*, fol. 310).

But all was done in enforcing an enactment which the Court has announced that it esteems as "highly politic" (*Id.*, fol. 189).

The petition for rehearing was denied (*Id.*, fol. 315) without further opinion from the Court and without even a correction of what, as plaintiff in error contends and respectfully submits, were extremely grave errors in statements of fact in the Opinion, pointed out in that petition (*supra*, p. 6). The dissenting opinion, afterwards delivered by Mr. Justice Hobson and already cited, appears in the record (*Id.*, fols. 316-321) and is also reported, (33 Ky. L. Rep'r., 49).

Case No. 224. The attempt to declare forfeiture.

Meanwhile, on June 3rd, 1907, pending the appeal in Case No. 223 (so great was the hunger of the instigators of Article III and their helpers), the petition seeking a judgment of forfeiture (Case No. 224) was filed in the name of the Commonwealth by the Commonwealth's attorney for the district including Pike County. *This was six months before the Court of Appeals had passed upon the constitutionality of Article III and five months before the Attorney General had declared on the hearing of the appeal of case No. 223 that that Article was unconstitutional as against both the State and National Constitutions* (*supra*, p. 4).

The petition for forfeiture (Record No. 224, fols. 33-157) justified all the forebodings of the plaintiff in error of the sinister influences supporting this Article III. It opens by describing the tracts of land of plaintiff in error sought to be forfeited, the description being less definite than those contained in the petitions to list (afterwards held to be insufficient by the Court of Appeals), inasmuch as the petition to forfeit does not show how the tracts adjoin each other, nor which of the tracts are bounded by County lines, nor what is the estimated number of acres in the County of a tract which extends over into an adjoining county, but on the contrary alleges that the tracts are "wholly or partly" within Pike County, Kentucky (Record No. 224, fol. 72). Then, after some allegations showing that deeds of some of these tracts appear of rec-

ord in Pike County in recent years and statements regarding the alleged interests of some of the defendants in some of the tracts (*Id.*, fols. 72–97), the petition to forfeit states that neither the plaintiff in error nor any of its predecessors in title nor any of the original patentees have at any time after the issuance of these patents respectively and before the filing of this petition ever caused the said land or any part thereof or any interest therein to be listed for assessment or taxation "or paid any taxes thereon and for more than 100 years next before the filing of the petition had abandoned all claim of title and no claim of title was ever made by any one under these patents until the claim by the plaintiff in error (*Id.*, fols. 98–99). None of these allegations are relevant to the cause of action which was based solely on the failure to list or pay taxes for the five years next preceding 1906; none of such allegations could have been based on any knowledge of the Commonwealth and the statements as to abandonment were contradicted by prior allegations in the same petition showing deeds transferring interests in some of these tracts and recorded in Pike County (*Id.*, fols. 74-86). Other of these allegations were afterwards contradicted by the depositions of witnesses called by the Commonwealth's attorney who signed this petition to forfeit, which witnesses showed that most or all of the tracts had been listed for years prior to 1825 and some of them in much more recent years (*infra*, p. 69). Thereupon after some statements of the County attorney's construction of the meaning of Article III and of the effect of the alleged failure of the defendants to list the lands, the petition prays for judgment declaring forfeiture under the alleged provisions of that Article III (Case No. 224, fols. 109–110).

Plaintiff in error demurred that the petition to forfeit did not state facts sufficient to constitute a cause of action against it (Record No. 224, fol. 162), and also moved to strike out (*Id.*, fol. 157) the allegations of non-payment of taxes for the years prior to the five years immediately preceding the enactment of Article III (*Id.*, fols. 98–99) and also the other allegations regarding the alleged construction by the County attorney of Article III (*Id.*, fols. 100–105). The demurrer was overruled in October, 1907,

(*Id.*, fol. 205) and the motion to strike was granted with respect to the allegations of non-payment of taxes prior to 1901 (*Id.*, fols. 206–207) but denied with respect to the other allegations of the petition to forfeit (*Id.*, fol. 207).

Thereupon plaintiff in error filed its answer and cross-petition, a general denial, and as further defenses set up its efforts to list its land for taxation, and made part of its answer (Record No. 224, fol. 217) the record on appeal from the Pike County Court to the Pike Circuit Court, which is part of the record in case No. 223, now before this Court, and stated that Article III of the Act of 1906 was enacted at the behest of the persons and corporations, designated by name in that answer and cross-petition, with the intent and purpose of thereby acquiring the title of plaintiff in error, and with the hope and expectation that the plaintiff in error would not appear to list its lands (Record No. 224, fol. 218); and that upon the filing of the petitions these same persons and corporations immediately began a systematic effort to array all local interests against the plaintiff in error, and by threats of assassination, menaces of violence, personal injury and disgrace sought to array local prejudice against the plaintiff in error, and to terrorize the counsel, agents and employees (*Id.*, fol. 215), and under various pretenses gathered hostile and armed crowds at the Court House to intimidate the plaintiff in error, its attorneys and representatives, and to influence the Court in its action (*Id.*, fol. 219); and that the refusal of the Pike County Court in case No. 223 to assess for taxation the lands as listed by plaintiff in error was "a denial of justice" by which plaintiff in error "was deprived of valuable "property rights, denied the equal protection of the laws "and the obligation of the contract guaranteeing its "titles impaired, in violation of the Compact between Ken-"tucky and Virginia, and the Constitution of Kentucky "and the Constitution of the United States" (*Id.*, fol. 217), and thereupon prayed that the above-mentioned persons and corporations be made parties to the action as the "real party in interest," and required to answer the cross-petition and to disclose their interest in these lands. The Court sustained a demurrer to this defence, dismissed the

cross-petition against them (Record No. 224, fols. 220 and 232–234), but overruled a demurrer to the first paragraph of the answer in which the plaintiff in error denied allegations of the petition (*Id.*, fols. 212–214, 232–234). This answer and cross-petition had been verified by local counsel in Kentucky, none of the officers of the plaintiff in error being in that State. Thereafter in January, 1909, the case not yet having been set down for hearing, the president of the plaintiff in error in New York verified an amended answer which was sent at once to Kentucky, but under the rules of practice could not be offered for filing till after the opening of the then next, *i. e.*, February Term.

In this amended answer, plaintiff in error after stating its incorporation, its objects and the dates of its acquisition of title, which was after the latest dates of alleged delinquency, and other matters in words hereinbefore quoted (*supra*, p. 23), further alleged as follows:

"(5) That during all the said years, 1901, 1902, 1903, 1904 and 1905 and for many years prior thereto and ever since continuously until the present time, those under whom this defendant claims and this defendant ever since it has acquired title thereto, have and has been prevented from entering upon said lands to possess or enjoy any part thereof or to ascertain what parts thereof has been adversely held for a period sufficient to toll the right of entry of those under whom this defendant claims or of this defendant, by a state of violence and by fear of bodily harm and of death, threatened by some of the occupants of parts of said lands against any and all persons claiming title or interest under the grants from the Commonwealth of Virginia set forth in the plaintiff's petition herein, and under which this defendant claims title and interest as an owner of the parts thereof whereof the right of entry has not been tolled by an actual adverse possession for a period sufficient to toll the right of entry of this defendant, and those under whom this defendant claims."

"(6) That prior to the enactment of the "Act relating to Revenue and Taxation" referred to in the plaintiff's petition herein, parts of each of said tracts of land described in the plaintiff's petition herein which parts amounted altogether to the whole, or almost the whole of each of said tracts of land were assessed and listed

for taxation on or as of the 15th day of September, 1901, the 15th day of September, 1902, the 15th day of September, 1903, the 1st day of September, 1904, and the 1st day of September, 1905, and on or as of each of said days, and that taxes thereby charged thereon were prior to said enactment, paid by occupants of parts of the lands so assessed, listed and charged therefor";

"(7) That during all said years 1901, 1902, 1903, 1904 and 1905, and for many years prior thereto and ever since and now, by the laws of the Commonwealth of Kentucky each of said occupants so paying said taxes on said parts of each of said tracts, immediately upon payment thereof became subrogated to the claim of said Commonwealth against the true owners of said lands for the amount of such taxes so paid and interest thereon and each of said occupants immediately thereupon acquired a lien on said land against said true owners, to wit, those under whom this defendant claims and this defendant, for the amount of such taxes so paid and interest and that no taxes are due nor can any further taxes be lawfully charged as of said years or any day therein against said lands nor against this defendant or those under whom this defendant claims;"

"(8) That the provisions of said Article III of said Act referred to in plaintiff's petition herein violate Section 10 of Article I of the Constitution of the United States which declares that no State shall pass any bill of attainder or *ex post facto* law;"

"(9) That said provisions of said Article III of said Act violate the provisions of the Compact between the Commonwealth of Virginia and the Commonwealth of Kentucky of December 18, 1789, which provide that all private rights and interests of lands within the Commonwealth of Kentucky derived from the laws of Virginia prior to the separation of Kentucky from Virginia shall remain valid and secure under the laws of the State of Kentucky and shall be determined by the laws existing on the 18th day of December, 1789, in the State of Virginia;"

(10) That said provisions of said Article III of said Revenue Act violate Section 10 of Article I of the Constitution of the United States which provides that no State shall pass any law impairing the obligation of contracts;"

(11) That said provisions of said Article III of said Act violate the Fourteenth Amendment of the Constitution of the United States which provides that no State shall deprive any person of property without due process

of law nor deny to any person within the jurisdiction the equal protection of the laws;"

(12) That irrespective of the invalidity of said provisions of Article III of said Act, this suit by the plaintiff herein against this defendant violates the aforesaid Sections, Articles and Amendments of the Constitution of the United States because this defendant has complied with any and all (if any) of the provisions of said Revenue Act that are valid so far as the same are applicable to this defendant if any of said provisions are valid with respect to this defendant; and this defendant has been guilty of no wrong and has not done or omitted to do any act which would forfeit this defendant's title or claim to any of said lands even if said provisions of said Article III of said Revenue Act were valid.

"And this defendant relies upon the provisions and declarations of each of said Sections, Articles and Amendments of said Constitution of the United States as defenses herein" (Record No. 224, fols. 242-245).

This amended answer was offered to the Court before the trial; but the Court sustained an objection to filing it and directed that it be endorsed "Tendered and offered to be filed on date of this order" (*Id.*, fol. 236).

The refusal by the Court to permit it to be filed was, it is contended, a denial of equal protection of the laws, because contrary to the practice of the Courts of that State as declared before and since that time by the Court of Appeals which has held that "while great latitude is allowed the trial judge in the exercise of his discretion as to permitting the filing of amendments to pleadings, *it should not be extended so far as to deprive a litigant of his right of defense*" (Lexington *v.* Williamson (1908), 32 Ky. L. R., p. 1019). In that case the amended answer was not offered until the middle of the trial (*Id.*, p. 1020), but the Court says:

"We are of opinion that the trial judge erred in refusing to permit the amended answer to be filed and proof to be offered in support thereof. It has been repeatedly held by this court *that at any time before the case is finally submitted to the jury* the court may, in furtherance of justice, permit an amendment to be filed.

"In the case of the National Mutual Association *v.* Jones, 84 Ky. Law Rep., 110, it was held that it was not error to set aside a submission and permit an amende

answer to be filed, where it did not substantially change the defense, conformed to the proof, and was in furtherance of justice. And in the case of Wade *v.* Moore, 3 Ky. Law Rep., 392, it was held not to be error to permit an amendment to be filed after the jury had been sworn. In all such cases it is the duty of the trial judge to put the party offering the amendment upon terms and require, if necessary, that he should pay the costs incident thereto, or even set aside the swearing of the jury and continue the case at his costs, or make such other order as may be necessary to do justice to the opposing litigant."

In Commonwealth *v.* Churchill, Ky. Ct. App., 1909, 115 S. W., 189, the syllabus reads: "The Circuit Court on appeal from the County Court dismissing a proceeding to assess property omitted may, after the submission of the case, allow an amendment of the answer so as to plead a former judgment in bar"; and the Court in its opinion said: "The amended answer set up a matter of record. The Circuit Court did not abuse a sound discretion in setting aside the submission and allowing the amended answer to be filed. The policy of the Code is to allow amendments of the pleadings, so that justice may be better administered (L. & N. R. R. Co. *v.* Hall, 115 Ky., 567, 74 S. W., 280)"; and in Young *v.* McIlhenny, Ky. Ct.App., 1909, 116, S. W., 728, the head note states that "under the Code the trial judge has a large discretion in permitting the filing of offered amendments, and the only limitation on the exercise of such discretion is to prevent the defeat of substantial justice, and an amendment should always be permitted where the demands of justice require it"; and the Court in the Opinion says: "Appellant Young insists that the Court erred in refusing to permit the amendment setting up the additional indebtedness of $125. to be filed, and that but for this error his claim would by $250. Under the Code provision the trial judge may exercise a large discretion in determining whether or not amendments offered should be permitted to be filed, and the only limitation which this court has ever placed upon the exercise of this discretion is to prevent its being exercised to the extent of defeating substantial justice. Where the ends of justice require it, the trial judge should always permit an amendment to be filed (Greer

v. City of Covington, 83 Ky., 410, 2 S. W., 323; Donnelly v. Pepper, 91 Ky., 383, 15 S. W., 879; Owensboro, etc., Railroad Company *v.* Harrison, 94 Ky., 408, 22 S. W., 545)."

In a recent case this Court reviewing proceedings of the Kentucky Courts says: "After the decision in the other case, the railroad company asked leave to plead the decree as a bar to so much of the relief in the present action as relates to stock shipped or desired to be shipped from points outside of Kentucky to points within Kentucky. The trial Court being of opinion that the decree would not be a bar, refused leave, *but ordered the proposed amendment to be made part of the record for the purpose of appeal*" (Louisville & N. R. R. Co. *v.* Central Stock Yards Co., 212 U. S., 132); and in another recent case where plaintiff in error offered amendments to its plea setting up rights under the Federal Constitution not claimed in the original plea, the State Court having struck out the amendments on the ground that they were filed without leave of Court, and the State Supreme Court having held that it was "an ingenious but unsuccessful effort to inject the Federal question," the case thereupon coming up for review, this Court said, Mr. Justice McKenna writing the opinion, that

> "Upon the ruling of the Court upon the amendments to the notice we are not called upon to express an opinion; but, we think, it is very clear that plaintiff in error was entitled to claim rights under the Constitution of the United States, based upon the case as presented. And if the rights asserted actually existed, plaintiff in error was entitled to an instruction directing a verdict in its favor. The claim was, therefore, made in time. Green Bay & M. Canal Co. *v.* Patten Paper Co., 172 U. S., 58, 43 L. ed. 364, 19 Sup. Ct. Rep., 97; Rothschild *v.* Knight, 184 U. S., 334, 46 L. ed., 573, 22 Sup. Ct. Rep., 391; Meyer *v.* Richmond, 172 U. S., 82, 43 L. ed., 374, 19 Sup. Ct. Rep., 106; Mallett *v.* North Carolina, 181 U. S., 589, 45 L. ed., 1015, 21 Sup. Ct. Rep., 730; Dewey *v.* Des Moines, 173 U. S., 193, 43 L. ed, 665, 19 Sup. Ct. Rep., 379" (National Mut. Bldg. & L. Asso. *v.* Brahan, 193 U. S., 635, at p. 646).

In Chicago, etc., R. Co. *v.* Chicago, 166 U. S., 226, the federal right was first "specially set up and claimed" on motion to set aside the verdict; and in N. Y. & N. E.

Railroad Co. *v.* Bristol, 151 U. S., 556, 560, 566, by an amendment to the "reasons on appeal."

Although the federal rights set up and claimed by plaintiff in error sufficiently appear from the Opinions of the Court of Appeals in both case No. 223 and No. 224 (Kreiger *v.* Shelby R. Co. 125 U. S. 39; Chambers *v.* Balt. & Ohio R. Co., 207 U. S. at p. 142; Montana *v.* Rice, 204 U. S. at p. 291; San Jose Ranch Co., 189 U. S. 180; Mallett *v.* North Carolina, 181 U. S. 188; McCullough *v.* Comm. of Va., 172 U. S. 102); and this Court on the question of sufficiency of allegations to present a federal right or privilege is not concluded by the views expressed by the State Court (Covington & L. Turnp. Road Co. *v.* Sandford, 164 U. S. 595; Mitchell *v.* Clark, 110 U. S. 645; Boyd *v.* Nebraska, 143 U. S. 180), yet this refusal to file the amended answer, it is submitted was therefore a denial of equal protection of the laws, although the record showing that it was offered thereby shows what federal rights were set up and claimed before and at the trial. This however appears elsewhere on the record of both Case 223 and 224 including the Opinions of the Court of Appeals. This amended answer was moreover included among the papers of the record on appeal to the Court of Appeals and is in the transcript of record of Case No. 224 now before this Court (fol. 237).

The trial and judgment in the Circuit Court in Case 224.

The depositions for the Commonwealth were taken in January, 1908, a few weeks before the opening of the term at which the trial was had and are in the record (No. 224, fols. 265–299). The direct examination of the witnesses was not by the attorney for the Commonwealth but by one of the instigators of Article III who was counsel for others of them and who, with such others, plaintiff in error had in vain sought to have made party to the action (*supra*, p. 62).

Notwithstanding that the Court had stricken from the petition to forfeit the irrelevant allegations regarding alleged non-payment of taxes prior to 1901 (*supra*, pp. 61-62), this counsel examined the witnesses upon this subject. From these depositions, it appeared upon

cross-examination of some of the Commonwealth's witnesses that of the 22 tracts in question, prior to the year 1825 "some were listed for taxation, and I think all were" (Case No. 224, fol. 259). This listing for taxation began about the year 1792 (*Id., Ib.*). Some parties paid the taxes on some of the tracts and other tracts were sold for nonpayment of taxes (*Id.*, fol. 260) and the deputy Clerk of Pike County testified that various of the tracts in question were listed for taxation by various parties claiming them, for years between 1882 and 1894 (*Id.*, fols. 287-288). This contradicted irrelevant statements of the petition of the Commonwealth's attorney, (*supra*, p. 61). On cross-examination it appeared and was admitted in evidence, against the objection of the counsel acting in the name of the Commonwealth, that except in relatively few instances, taxes on all these lands for the years 1901, 1902, 1903, 1904 and 1905 have been paid, and that the "citizens" who so paid were, as a rule, occupants of the land (Record No. 224, fols. 295, 298). But the Court sustained exceptions to these depositions, except in so far as they are directed to the listing or failure to list, or payment or failure to pay taxes, as of the dates September 15, 1901, 1902 and 1903, and September 1, 1904, and 1905 (*Id.*, fol. 248-251).

The defenses in the original answer having been stricken out (*supra*, p. 62), and the Court having refused to file the amended answer, plaintiff in error offered no evidence, except the entire record in the Pike County and Circuit Courts (Record No. 224, fol. 236), which it filed as an exhibit with its original answer. The same is now before this Court as part of the Record in Case No. 223; and although the trial Court sustained an objection to the reading of it to the jury (Record No. 224, fol. 303-304), it was considered by the Court of Appeals in its Opinion (Case No. 224, fol. 341).

The Circuit Court, having rendered judgment purporting to declare a forfeiture of its titles (Case No. 224, fols. 1-26, 303-335), plaintiff in error appealed to the Court of Appeals.

On the hearing in the Court of Appeals, counsel for plaintiff in error again submitted a brief in which all the

objections to Article III were set out *verbatim* as they had appeared in the Amended Answer and afterwards appeared in the specifications of error, on the petition for writ of error from this Court supporting such objections by references to the brief and petition for rehearing which had already been submitted to the Court in Case No. 223, and by adding thereto many other authorities; and also contended that the refusal of the trial Court to file the amended answer contrary to the well established practice of the Court was a denial of equal protection of the laws.

The Attorney General filed a brief contending, like his predecessor in office, that Article III was unconstitutional. But counsel for the instigators of Article III were again heard by the Court in support of that Article.

The opinion of the Court of Appeals in Case No. 224, affirming the judgment of forfeiture was rendered June 20, 1908 (Record No. 224, fols. 339–346). Notwithstanding that this is the earliest decision of the Court sustaining forfeiture except that of the Kentucky Union Co., herein elsewhere referred to, decided a few months earlier, but as herein elsewhere stated not involving the same questions, the opinion is marked "Not to be reported" (Record No. 224, fol. 339) to wit, not to be contained in the series of reports published at the expense of the State (Ky. Stats., Carroll's Ed'n., 1903, Section 956; Russell's Ed'n., 1909, Section 2794). It is contained in the record now before the Court (No. 223, fol. 339–346) and like the Opinion in Case No. 223 as already shown, is part of the record for all purposes (*supra*, p. 36) and is elsewhere reported (33 Ky. L. Repr., 857).

It opens with what purports to be a review of the proceedings in the Pike Circuit Court from which the appeal was taken, and states that the record in Case No. 223 filed with the answer of plaintiff in error in Case No. 224 shows that the plaintiff in error "had filed its petition in the Pike County Court claiming to comply with the provisions of the Act and at the same time attacking its constitutionality" (Record No. 224, fol. 341); but the Court does not mention the defense that Article III was enacted at the instigation of certain private parties and corpora-

tions, who sought to array local prejudice against plaintiff in error and its counsel and gathered hostile and armed crowds at the Court House, nor the prayer of plaintiff in error that these instigators might be made parties to the action and required to disclose their interests in the lands (*supra*, p. 62); nor does this opinion even mention the plea that the plaintiff in error was not an owner of the lands until after the latest dates of alleged delinquency; nor the plea that its grantors for many years prior to the enactment of Article III, and ever since had been prevented from approaching their lands by threats of violence and bodily harm and death from some of the occupants; nor the plea that taxes upon all or almost all these lands for all the years named in Article III had been paid by occupants who thereby under the express provisions of the Statutes of Kentucky had become subrogated to the claim and lien of the State against the true owner, and the Court takes no notice of the contention of plaintiff in error argued on the appeal in Case No. 224, that the refusal of the trial court to file the amended answer was a denial of equal protection of the laws.

But the Opinion does make a statement of fact for which, it is submitted, there was no evidence whatever before the trial court nor before the Court of Appeals, viz., that neither the patentees or any others in privity with the title of the plaintiff in error paid any taxes on these lands since the year 1825 (*Id.*, fol. 343). Here the Court states as shown by the evidence an alleged fact which had been denied generally by the answer of the plaintiff in error (*Id.*, fol. 212), and regarding which whether true or not the plaintiff in error would have been prevented from offering any evidence, because Article III relates only to taxation in or after the year 1901, and the statements of the petition of the Commonwealth's attorney of an alleged failure to pay taxes "for more than 100 years before the filing of the petition" (*Id.*, fols. 98–99, p. 42), were stricken out by the trial court before the trial (*Id.*, fol. 207) and all the evidence relating thereto had been excepted to by the plaintiff in error and *the cross-examination regarding the same had been excepted to by the Commonwealth* (*Id.*, fols.

249-251) and the trial court had sustained the exceptions thereto (*Id.*, fol. 249).

Passing from the facts to the law, the remainder of the Opinion is very short. In truth, it seems there was little to be said but either to overrule or to reiterate the rulings of the Opinion in Case No. 223 which had foredoomed the plaintiff in error. The Court chose the latter course and wrote as follows:

> "The various objections to the Act upon constitutional grounds were urged in the original appeal of Eastern Kentucky Coal Lands Corporation *v.* Commonwealth, 32 Rep., 129, and in the case of Kentucky Union Company *v.* Commonwealth, decided March 25, 1908, not only upon oral argument, but also in exhaustive briefs filed on behalf of appellants upon the appeal, and again with the petition for rehearing. Because of the importance of the questions involved, the time for oral argument was extended in each case, and the questions presented in argument and brief received careful consideration. In each of these cases we concluded that the Act in question violated no provision of the constitution, either Federal or State. This conclusion is not shaken by the able reargument on this appeal, and we now approve of and adhere to the opinions in these cases. In conformity with those opinions we hold that Article Three, as construed by this Court, does not violate the provisions of the Federal Constitution denying the passage by any State of *ex post facto* laws, laws impairing the obligations of contracts, or laws denying to any person the equal protection of the law, or depriving any person of his property without due process of law" (Record No. 224, fol 343).

After citing in support of this conclusion a number of decisions, all of which, it is respectfully submitted, are too irrelevant to require discussion, except the decision of this Court in King *v.* Mullins, which is herein elsewhere considered (*infra*, pp. 200-220), the Court proceeds to distinguish some of its own prior decisions on grounds which it is herein elsewhere contended are untenable; then proceeds to free the co-defendant Twyman on grounds which, it is again respectfully submitted, have been already shown to require a manifest unconstitutional discrimination against and denial of equal protection of the laws to the

plaintiff in error (*supra*, p. 52); and concludes the opinion with the statement that "Judge Hobson does not dissent from the opinion because he deems the matters concluded by the former opinions of the Court, although he adheres to the conclusions stated in his dissenting opinion in those cases" (Record No. 224, fol. 345).

Judgment of the Court of Appeals affirming the judgment of Pike Circuit Court declaring the forfeiture of all its property having been entered (Record No. 224, fol. 338), plaintiff in error thereupon prayed for and was allowed writs of error to bring before this Court the judgment and proceedings in Case No. 223 (Record, fol. 326) and No. 224 (Record, fol. 350), upon assignments of error which reiterate the many objections which in these cases have been already so often urged in vain by the plaintiff in error before the Courts of Kentucky (Record No. 223, fol. 323; No. 224, fol. 347).

Such are the outlines of the dark history of those wrongs suffered by the plaintiff in error which it now prays that this Court will set right.

ARGUMENT.

I.

Article III violates Section 10, Article 1, of the Constitution of the United States, which declares that no State shall pass any bill of attainder or ex post facto law.

"Any law passed after the commission of an offense which . . . in relation to that offense, or its consequences, alters the situation of a party to his disadvantage, is an ex post facto law."

Mr. Justice Miller,
in Kring vs. *Missouri, 107 U. S., 233, quoting with approval Mr. Justice Washington.*

"Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared by some previous law to render him liable to that punishment."

Mr. Chief Justice Marshall,
in Fletcher v. *Peck, 6 Cranch, 138.*

"It was against the excited action of the States under such influences as these that the framers intended to guard. . . . Under this form of legislation the most flagrant invasion of private rights in periods of excitement may be enacted."

Mr. Justice Field,
in Cummings vs. *Missouri, 4 Wall., 322, 330.*

This objection was argued by Counsel for plaintiff in error on the hearing of the earlier case (No. 223) and in the petition for rehearing in that case (*Id.*, 279–289) and set up in express terms in the Amended Answer of Case 224 (fol. 244) and again argued on the hearing of Case No. 224 in the Court of Appeals, and is one of the assignments of error in each case (Record No. 223, fol. 323, Record No. 224, fol. 347).

In the petition for rehearing, counsel deplored the meagre consideration which the Court of Appeals devoted to this objection and said:

"It seems to be a misfortune to the cause of justice that the Court in its opinion should have disposed in ten lines of one of the most atrocious features of this Article III., viz., its *ex post facto* provisions, and should have then forthwith diverted attention to a supposed assumption of counsel for appellant, 'that every restrospective statute is unconstitutional.' Counsel for appellant do not assume, and never have assumed, a proposition so contrary to elementary law. But the inference that the Court proceeds to draw, viz., that 'the only inquiry is has the Legislature clearly indicated its purpose to tax the property retrospectively' is, it is submitted, glaringly erroneous."

"The real question on this point (it is submitted) is whether the contention stated in appellant's brief is well founded, viz., that Article III is an *ex post facto* law imposing a punishment and extreme penalty for an omission before its enactment to comply with a duty not then existing or not subject to such penalties." (Record No. 223, fol. 282).

This Court has neither faltered nor wavered in construing and enforcing this clause of the Constitution.

In words never to be forgotten Mr. Chief Justice Marshall in announcing the judgment of this Court a century ago, declared:

"The state legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable

to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The Court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?"

Fletcher *v.* Peck, 6 Cranch, 87, 138, 139.

These words are quoted in a later Opinion in which this Court said:

"By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required. . . . Under this form of legislation the most flagrant invasion of private rights, in periods of excitement, may be enacted, and even whole classes may be deprived of political and civil rights."

Cummings *v.* State of Missouri, 4 Wall., 277, 332.

Still later this Court held that a West Virginia Act requiring a non-resident defendant to state in his petition, and verify the same by his oath as a condition of being permitted to appear and defend, that he has not committed certain designated public offences, deprives such defendant for past misconduct and without judicial trial of an existing right, and partakes of a bill of pains and penalties, and is violative of the constitutional inhibition against the passage of bills of attainder. Pierce *v.* Carskadon, 83 U. S. (16 Wall.,) 234.

All these cases were in the mind of this Court when still later it was declared that:

"To impose upon the owner of the goods a criminal punishment or a penalty of $377 for not paying an additional tax of four cents a pound, would subject him to the operation of an *ex post facto* law."

"An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the

time it was committed or a punishment in addition to that then prescribed. Carpenter *v.* Pa., 17 How., 456.

"Had the proceeding against Salmon & Hancock been taken by indictment instead of suit for the excess of the tax, and the one was equally authorized with the other, the proceeding would certainly have fallen within the description of an *ex post facto* law."

In Fletcher *v.* Peck, 6 Cranch, 87, it was decided that an Act of the Legislature by which a man's estate shall be seized for a crime which was not declared to be an offense by a previous law, was void."

"In Cummings *v.* Missouri, it was held that the passage of an Act imposing a penalty on a priest for the performance of an act innocent by law at the time when it was committed, was void. 4 Wall., 277.

"To the same purport is Pierce *v.* Carskaden, 16 Wall., 234.

"The cases cited hold that the *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal."

Burgess *v.* Salmon, 7 Otto, 381, 385.

Again this Court in holding not only that a change in the character of crime or its punishment, but even a change in the forms of precedure, if it substantially affects a delinquent's former rights, may be void as an *ex post facto* law with respect to prior offenses, after reviewing many authorities, says:

"We are of opinion that any law passed after the the commission of an offense which, in the language of [Mr. Justice] Washington, in U. S. *v.* Hall 'In relation to that offense *or its consequences*, alters the situation of a party to his disadvantage' is an *ex post facto* law."

Kring *vs.* Missouri, 107 U. S., 236.

And even in the dissenting opinion the other Justices admit that a law which "gave to the circumstances which constituted and attended the act *a legal signification more injurious* to the accused than was attached to them by the law existing at the time of the transaction" would be *ex post facto* and void (*Id.*, p. 249).

The above cited language of the opinion of the Court in Kring *vs.* Missouri is quoted, approved and followed in Thompson *v.* State of Utah, 170 U. S., 343, 351.

The repeal of a granting act can have no effect on titles vested thereunder (Rice *v.* Minnesota, etc., R. Co.,

66 U. S., 358, 373, citing Terrett *v.* Taylor, 9 Cranch, 43; Pawlet *v.* Clark, 9 Cranch, 292).

"Under the form of creating a qualification of attaching a condition the State cannot, in effect, inflict a punishment for a past act which was not punishable when it was committed (Cummings *v.* Missouri, 4 Wall., 277).

A law denying remedy unless taxes have been paid cannot retroact (Walker *v.* Whitehead, 16 Wall., 314, 318).

A statute "authorizing taxation of property for "the taxation of which there was no previous legal "authority cannot justify the assessment of such "property for previous years before the statute was "passed" (Wagoner *v.* Evans, 170 U. S., 588).

"In order to render legislation unconstitutional as *ex post facto*, it is not necessary to show that it must be detrimental to all persons charged with offenses; it is sufficient that it materially alters their condition in a manner which may be detrimental to some. *In re* Murphy, 87 F., 549."

"A Legislature probably cannot constitutionally enact a retro-active law imposing taxes for previous years upon property which was not during such years subject to taxation under any valid law. First Nat'l Bank *v.* City of Covington, 103 Fed., 523.

A fortiori the Legislature cannot impose a penalty for a so-called delinquency in having failed to have paid such taxes.

"A legislature cannot declare what the law was but what it shall be. To declare what the law is or has been is a judicial power; to declare what the law shall be is legislative." Ogden *v.* Blackledge, 2 Cranch, 272.

"It is not essential, however, in order to render a law invalid on these grounds, that it should expressly assume the action to which it relates to be criminal or provide for its punishment on that ground.

"If it shall subject an individual to a pecuniary penalty for an act which when done, involved no responsibility, or if it deprives a party of any valuable right—like the right to follow a lawful calling—for acts which were innocent when committed, the law will be *ex post facto* in the constitutional sense, notwithstanding it does not in terms declare the acts to which the penalty is attached criminal."

Cooley's Constitutional Limitations, 6th Ed., p. 320.

"A law whose object is the punishment of past offenses is unconstitutional as *ex post facto* law, although the penalty is merely a civil disability, such as a disqualification from practising a profession, from prosecuting or defending a civil action, or a forfeiture of property by civil process." (8 Cyc., p. 1033.)

"The *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal." (Burgess *vs.* Salmon, 97 U. S., 381.)

Const., Art. I, Sec. 9, providing that no *ex post facto* law shall be passed, and Section 10 that no State shall pass any *ex post facto* law, apply not merely to criminal laws, but to cases for the recovery of penalties and forfeitures. United States *v.* Hughes, Fed. Cas. No. 15,416 (8 Ben., 29).

The term "penalty" involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by civil action or criminal prosecution.

U. S. *v.* Chouteau, 102 U. S., 603; cited in 146 U. S., 667.

The law so declared by this Court has been duly followed in Kentucky prior to the decisions now before the Court.

The Virginia Act to adjust pay, etc., of officers and soldiers of Virginia line and appropriating lands for that purpose could only restrain future entries and locations of such lands and not retrospectively defeat prior entries and locations; Marshall *v.* Clark, 1 Ky. (Hughes), 77; an act of 1858 amending Ky. Rev. Stat., Ch. 63, to make new statute of limitations apply to causes of action which accrued prior to revised statutes—held unconstitutional because in conflict with Section 37 of Art. II of Ky. Constitution (Chiles, &c., *v.* Monroe, Ky., 4 Met., 72, followed in Mattingly *vs.* Helm, I Ky. Op., 583); an act remedying a defect in a prior act that rendered such prior act unconstitutional cannot have a retro-active operation, and no conviction can be had under the prior act unless the offense be committed after the amendatory act (Comm. *vs.* Edwards, 39 Ky. (9 Dana), 447; taxes are not collectable for a period during which the court held that the citizen was not liable to taxation, although the decision was *afterward overruled* (84 Ky., 59).

In McCracken County *v.* Mercantile Trust Co., 84 Ky., 344, the Court of Appeals of Kentucky, where a Statute of Kentucky authorized a County in order to enforce its lien for taxes on lands that had been previously bought in by the County on a sale therefor, held that a provision that in such proceedings " no plea of the statute of limitations shall be interposed thereto other than the Statute of fifteen years" (84 Ky., at p. 346) was void because under the general law the limitation was five years (*Id.*, p. 347), and the Court says " it is clear that at the time of its passage the collection of the claim could not be enforced. The defense to it was perfect . . . *A retrospective law which divests a vested right is beyond the constitutional limit of legislative power* " (*Id.*, pp. 347–348).

" Although retrospective legislation neither *ex post facto* nor impairing contracts may be constitutional as when it only regulates remedies for existing rights and wrongs, or aids or confirms rights—yet, consistently with the spirit of the Constitution, personal or proprietary rights cannot be injuriously affected by any such legislation. *No such retrospection can operate civilly any more than criminally* on an antecedent act for which, when done, there was no liability to an action for damages or penalty. It is quite as easy to construe the Act of 1866 prospective as retrospective. But, had it been expressly retroactive, it should not be applied to this case, because *it partakes of the obnoxious spirit of all ex post facto legislation in authorizing vindictive damages, not merely compensatory but highly punitory.* This statute, therefore, cannot uphold this action, and we know of no law that can sustain it " (O'Donoghue *vs.* Akin, 63 Ky. (2 Duv.) 478, Opinion by Judge Robertson).

In a very recent case, where it was sought to enforce an ordinance for the listing of property omitted from taxation in previous years, the Court said:

" The ordinance in question, when properly passed by the City Council, is to be tested as an act of the Legislature.

" This brings us to consider the next objection to the ordinance, which is, that it is ' retroactive and an *ex post facto* law.' *To the extent of the penalty it is void.* The Circuit Court so held, and did not impose the penalty in this case " (Muir's Adm'r. *vs.* City of Bardstown, 120 Ky., 739; 27 L. Rep'r., 1150, 1152; 87 S. W., 1096).

The principal distinction between the just cited case and the case now before the Court, is that it did not appear in the case cited that the Legislature was anxious to confiscate the owner's property without compensation.

"The penalty attempted to be annexed for the failure to list the property, when no such penalty existed at the time of this omission, *cannot be enforced*" (Hoke *vs.* Commonwealth, 79 Ky., 568, 581).

The opinion of the Court in the above cited case of Muir *vs.* Bardstown was delivered after the opinion of the Court, written by the same judge in Thornton *vs.* McGrath (1 Duv., 355), which is cited in Durrett *v.* Davidson (29 Ky. L. Rep'r., 404). The distinction between Thornton *vs.* McGrath and Durrett *vs.* Davidson (cited by the Court of Appeals in the Opinion in Case No. 223) on the one hand, and the above cited cases of Muir *vs.* City of Bardstown, O'Donoghue *vs.* Akin and Hoke *vs.* Commonwealth and similar cases on the other side is too great to need elaboration.

The former are cases holding that the taxes may be imposed retrospectively; the latter cases hold that no new penalties of any kind can be imposed retroactively. The penalties in these cases were mere trifles compared to the penalty of forfeiture which is sought to be imposed in the case now before the Court.

The opinion of the Court of Appeals in Case No. 223 errs in stating that counsel for appellant were ignorant of this elementary distinction, and assumed that all retrospective legislation is invalid. The legislation now under consideration, however, is of that vicious kind that is void because it attempts to exercise a tyrant's power and to punish for past omissions without having previously notified of the penalty.

Statutes fixing the times within which claimants to property may assert their rights are not constitutional when vested rights are impaired. (8 Cyc., 905—citing Louisville Bank *v.* Board of Trustees of Public Schools, 83 Ky., 219, "holding that an act providing that money on deposit, the last owner of which had not been heard from for eight years, should vest in the Commonwealth, etc., is unconstitutional, as depriving the depositor and depositary of vested rights.")

"A court of equity cannot order the sale of lands in satisfaction of a debt which was contracted prior to the passage of the act subjecting lands to the payment of debts." (Estill's Heirs *v.* Lewis, 2 Ky. (Ky. Dec.), 343).

"Ky. Stats., Sec. 2,377, providing that no action shall be maintained for the recovery of land, where the claimant relies alone on a patent issued by the Commonwealth prior to the year 1820, against any person claiming such land by possession to a well defined boundary under a title of record, unless such claimant has actually paid or caused to be paid to the State the legal tax assessed against the land for at least three years next preceding the bringing of the action, is unconstitutional and void to the extent that it is retroactive." (Shaw *v.* Robinson, 111 Ky., 715, 64 S. W., 620, 23 Ky. Law Rep., 998.)

In the above cited cases the Court has been merely declaring the law recognized and enforced, not only in Kentucky, but by the State Courts throughout the land.

A similar law has been already declared to be unconstitutional by the highest Court of a neighboring State:

"The act contains another most singular provision, which of itself would be fatal to its validity, were there no other objections. It provides that this forfeiture of the land shall become absolute upon the failure to pay not only such taxes as were actually levied, but also all those 'which ought to have been levied and assessed.' Whether the Legislature could pass a valid act providing for the forfeiture of land for non-payment of taxes *thereafter* lawfully levied, is a question not before us, and on which it would be useless to express an opinion. It must be borne in mind that this act does not pretend to provide for the *collection* of back taxes, but imposes a *forfeiture* for the failure to pay back taxes. The principles are essentially different. The first simply provides for the collection of the debt; while the other is, in effect, a *confiscation* of the property for an antecedent omission of duty."

Parish *v.* East Coast Cedar Co., 133 N. C., 478; 45 S. E., 768, 770; 98 Am. St. R., 718,

followed in

1904, Roper Lumber Co. *v.* Elizabeth City L. Co., 135 N. C., 742; 47 S. E., 757.

So, too, in Virginia and the other States.

A legislative interpretation changing titles, founded on existing statutes, is subject to every objection which lies to an *ex post facto* law, since it would destroy rights already acquired under former statutes by one made subsequent to the time when they became vested (1792, Turner *v.* Turner, 4 Call. [Va.] 234). An act creating a lien cannot be construed retroactively because that would defeat vested rights (Day *v.* Pickett, 4 Minif. [Va.] 104). An *ex post facto* law is one which imposes a punishment for an act which was not punishable when it was committed, or imposes additional punishment or changes the rules of evidence, by which less or different testimony is sufficient to convict (Town of Danville *v.* Pace, 25 Grat. I, 18 Am. Rep., 663).

The legislature cannot destroy or diminish the value of an existing judgment, as it is a vested right of property (Merchants' Bank of Danville *v.* Ballou, 98 Va., 112; 32 S. E., 481; 44 L. R. A,, 306; 81 Am. St. Rep., 715). An act which attempted to make certain railroads personally liable to a city for the payment of special improvement assessments made prior thereto, and for which before its passage they were not so liable—held unconstitutional and void (City of Grand Rapids *vs.* L. S. & S. Ry. Co., 89 N. W., 932).

An act authorizing a board of education of a township to pay to the board of education of a school district, set off and created therein, a sum of money equal to the equitable share due to the latter from the township school fund—held violative of Const., Art. 2, 28, *as it is an ex post facto law*, in that it attempts to create and enforce a liability that did not before exist (State *vs.* Board of Education, 12 O. C. D., 423). A statute imposing a penalty for prior omissions by owners of taxable property was held void in Gager *v.* Prout, 48 Ohio St., 89; 26 N. E., 1013; Erie Co. *v.* Walker, 10 Ohio Dec. (Reprint), 458.

The Legislature may impose a penalty for the nonpayment of future accruing taxes, but cannot attach it to taxes which accrued before the statute imposing the

penalty (Ryan *v.* State, 5 Neb'r., 276). A law imposing a penalty for non-payment of a tax having been repealed—*held* that the tax might be reimposed by subsequent legislation, but the penalty could not be revived (Dixon *vs.* Jersey City, 38 N. J. Law (8 Vroom), 39). An act creating a lien cannot be construed retroactively, because it would defeat vested rights (8 Cyc., 900; citing Day *v.* Pickett, 4 Minif. (Va.), 104; Carpenter *v.* Penn, 17 How. (U. S.), 456; Watson *v.* Mercer, 8 Pet. (U. S.), 88; Calder *v.* Bull, 3 Dall (U. S.), 386; Van Horne *v.* Dorrance, 2 Dall (U. S.), 304). A statute declaring the construction to be given to a prior act cannot affect rights existing prior to its enactment (Stebbins *v.* Pueblo Co. Comm., 4 Fed., 282; 2 McCrary, 196; Harley *v.* City of Phila., 68 Pa. St., 45; 8 Am. R., 153). A statute changing the basis of valuation for the assessment of a tax cannot act retrospectively (Howard *v.* Savannah, T. U. P., Charlton (Ga.), 173). Statutes highly penal in their nature should not be held to apply to back taxes (People *vs.* Peacock, 98 Ill., 172; Weister *v.* Hale, 52 Pa. St., 474).

"Sess. Laws 1903, p. 262, C. 137, provides that, in an action for the recovery of real estate on which permanent improvements have been made by one holding in good faith under color of title, the value of the improvements shall be allowed as a counter claim to the defendant, and if plaintiff fails to pay the value of the improvements, defendant shall be permitted to pay the value of the land and become the owner in fee simple. *Held*, that, if the statute purported to be retrospective, such provision would be invalid, as affecting vested rights (Investment Co. *v.* Hambach, 80 P. 190, 37 Wash., 629").

The same principle applies to judicial decisions. These cannot have the effect of an *ex post facto* law in divesting rights or impairing contracts any more than can acts of legislature.

Havermeyer *v.* Iowa Co., 70 U. S., 294.
Weightman *v.* Clark, 103 U. S., 256.
Louisiana *v.* Pillsbury, 105 U. S., 278.

"The definition of such an offense and the classification of the offenders are legislative and not judicial

functions. An act which is not by the expressed will of the Congress *an offense may not be made so after its commission by a broad construction of the statute, subsequently adopted by the judiciary.* One who does not fall clearly within the class of persons specified in such a law before he performs the act charged upon him may not be brought within that class after the event *by judicial construction* (United States *v.* Wiltberger, 5 Wheat., 77, 96; United States *v.* Germaine, 99 U. S., 508, 510; Field *v.* United States, 137 Fed., 6, 8, 69 C. C. A. 568, 570; United States *v.* Clayton, Fed. Cas. No. 14,814; *In re* McDonough (D. C.), 49 Fed., 360; United States *v.* Lake (D. C.), 129 Fed., 499)."

Martin *v.* United States, 168 Fed., 199, 202.

"The definition of the offense and the classification of the offenders are legislative, not judicial, functions, and one who was not beyond reasonable doubt within the class declared punishable by the expressed will of Congress may not be brought within that class after the event *by interpretation.*

"*Ex post facto law by judicial construction is as pernicious as ex post facto legislation.*" (Erbaugh *v.* United States, 173 Fed., 433, 435—citing also Martin *v.* United States [C. C. A.], 168 Fed., 198).

(1) This "Article III," as construed by the Court and sought to be applied against the plaintiff in error and all other owners is void as an ex post facto law.

(*a*) *Because it seeks to make a delinquency prior to the enactment, a "cause of forfeiture" when it was not a "cause" prior to the Act* (*supra*, pp. 5-9).

As was said by counsel for another defendant in the Court below:

"The Legislature can act retrospectively only for the purpose of furnishing a remedy for the enforcement of some pre-existing legal or equitable right or duty, and not for the purpose of creating such right or duty, and it cannot provide that a payment which operated as a discharge, when it was made, shall not now have that effect. That the person who drafted the statute supposed that it created a new duty, seems quite clear, and it is difficult to understand how the former statute could be construed as requiring every claimant to both list the land and pay the taxes assessed, in view of the provision that a payment by the occupant should give

him a right of action against the owner for the amount paid, and the requirement that the land should be listed by the owner or person in possession. (Ky. Statutes, Sec. 4052).

"In Town of Bellevue *v.* Peacock, etc., 89 Ky., 495, the Court held that an Act giving a lien upon abutting property for the cost of street improvements made prior to the Act, and at a time when there was no statute in force imposing the cost of improvements upon the abutting property, was unconstitutional.

"In First National Bank *v.* Covington, 103 Fed., 523, District Judge Evans cited that case with approval.

"In Franklin County Court *v.* L. & N. R. Co., 84 Ky., 59, this Court held, as stated in the syllabus, that, where there has been a failure to list property for taxation because of the decision of the Court of last resort in the State that such property was not subject to taxation, the fact that the Court subsequently decides that the law was misinterpreted, will not authorize the collection of taxes on the property for the period during which the law, as announced and understood, did not require such property to be listed for taxation."

"Taxes are not liens unless declared so by the Legislature under whose authority they are assessed. Still less can a lien be created by the mere duty to assess taxes which has not been performed" (Heine *v.* Board of Levee Comm'rs., 19 Wall., 655).

(*b*) *Because it seeks to forfeit the true owner's title for failure to pay taxes, which prior to the enactment had been paid by others whom the Commonwealth had subrogated to its claims for such taxes* (*supra*, p. 3); and seeks under penalty of forfeiture to impose the duty of listing lands for taxation for years prior to the enactment, although the same lands had been listed and taxes thereon paid by others prior to such enactment, whereas during all said years prior to such enactment it is respectfully submitted, no such duty existed, nor any statute so requiring (Appellant's Petition for Rehearing, Record No. 223, fols. 262–272).

This point is elsewhere more fully considered (*infra*, p. 227).

On this point it was said by counsel for another defendant in the Court below:

"As to the duty to list as distinguished from the duty to pay the taxes, it may be that every claimant

may be required to list his claim so that the assessing officer may determine in whose name to assess the property, and may be penalized for failing to do so, but the Legislature certainly cannot require property to be listed for past years for which taxes have already been paid.

"If the duty to list existed the fact that it was performed by some other person might not relieve the owner from the penalty imposed by the statute for failure to perform the duty, but the duty cannot be imposed upon the claimant for the first time after it has already been performed by some other person and the taxes paid, the only object of listing being to secure the payment of the taxes."

And elsewhere in the same brief:

"It has been held in some cases, as in Durrett *v.* Davison, 29 Rep., 401, that where there has been an unequal distribution of the burden of taxation for a specific purpose, the burden may be equalized by a subsequent statute, but it does not follow that the Legislature, after providing for the payment of taxes by a person other than the owner, has the power, after payment has been accepted pursuant to that statute, to declare that there has been no payment, and that the owner himself and every other claimant must pay taxes on the same property for the same years."

(c) *Because by a new construction of the Statutes previously existing and still existing the Court seeks to forfeit* the true owner's title for failure to comply with conditions regarding the listing of lands for taxation that were not required when the lands "ought to have been" listed—for instance, the requirements under penalty of forfeiture, that an owner must disclose the names of the owners of the remaining portions of the tract, and must describe his exact interest in the land, whereas prior to this act and even now others are permitted to list the land itself without designating the names of joint owners, or their interest therein, and to have a remedy over against their co-owners for their share (Ky. Stat., Sec. 4035, Revenue Act of 1906, Article I, Sec. 17).

This point has been already considered (p. 44, *supra*).

(d) *Because by another new construction of the former Statutes of Kentucky contrary to the express terms of*

those statutes, the Court by declaring that each conflicting title and not the land itself was taxed seeks to make ex post facto a delinquency prior to the act when no such delinquency then existed—for the newly invented doctrine that the title not the land was taxed did not exist in the five years prior to 1906. No case can be found in the whole of Kentucky's history prior to the Act of 1906 which required an owner to pay again taxes on his land where the tax had been already paid by another whether claiming under the same or a hostile title.

(*e*) *Because this Article III expressly prohibits and prevents escape* by making a payment after January 1, 1906; more than three months before the enactment and more than six months before the Act went into effect (see *supra*, p. 18).

Apologists for this Article III have suggested that the date in this section, January 1, 1906, may be a clerical error and the date intended was 1907, instead of 1906. But a citizen's property cannot be forfeited for failure to comply with a "law" that did not "intend" to impose conditions that actually were imposed by the letter of the law itself; and moreover this, like all other apologies for this Article III, is without foundation and is refuted by the last clause of the same, which expressly declares that where such payment is made after the passage of this Act (*i. e.*, after March 15, 1906), the amount to be paid shall be ascertained and payment made as in this Article provided" (*supra*, p. 18).

(*f*) *Because this Article III makes a condition of extinguishment of forfeiture the payment of penalty that did not exist at the time of the delinquency.*

Upon this point Judge Hobson in his dissenting Opinion, says:

> "The first section of the act makes it the duty of every owner or claimant of land to pay all the taxes which had been assessed, or should have been assessed, against him, or those under whom he claims, as of the 15th day of September, 1901, 1902, 1903, 1904 and 1905. And if it had not been assessed for any of these years, the act made it his duty to assess the land and pay the taxes, interest and penalty therein provided for. His

failure to do this is made a cause for the forfeiture of his title, but this forfeiture shall be extinguished if, on or before March 1, 1907, he lists the land and pays the taxes with the interest and penalties provided by law in case of the redemption of land sold for the non-payment of taxes. When land is sold for the non-payment of taxes, a penalty of fifteen per cent. is added, and the taxes bears interest at the rate of ten per cent. So, that, the meaning of the act is that the owner of land who had failed to list it for the years named must list it after the act takes effect and pay a penalty of fifteen per cent., also interest on the taxes at ten per cent. per annum from the time he was delinquent, that is, from the time the land should have been assessed. By the law in force up to the time this act took effect, the owner of land which had been omitted from assessment might voluntarily have it assessed at any time and pay the taxes without interest or penalties. If he failed to list it voluntarily, and a proceeding was instituted against him under Section 4241 of the Kentucky Statutes, he was liable to a penalty of twenty per cent., which went to the officer instituting the proceeding; but, even in this case, he was not liable for interest at ten per cent. on the taxes; and if he made the assessment voluntarily without a proceeding being instituted against him, he was not liable for the penalty of twenty per cent. While the act gives him until March 1, 1907, to list his property and pay the taxes, from the moment the act took effect the only way that he could escape the forfeiture of his title was to pay not only the taxes but the interest and penalty. The act does not give him a certain length of time to list his property and provide that if he fails to list within that time he shall be subject to the penalty, but it imposed the penalty upon all who are delinquent in listing their land and who would escape the forfeiture of their title by listing it after the act takes effect. It is said that so much of the act as imposes the penalty for the past delinquency may be rejected; and that the balance of the act may stand; but this is not a case in which that rule can be applied, for the reason that the act forfeits the title of all persons who had failed to list their land for the years named, and the only way in which they can escape the forefeiture is by paying the taxes with interest and penalty. If they do not pay the taxes, interest and penalty, the forfeiture stands. If that part of the act which provides for the extinguishment of the forfeiture is invalid, then there is no way in which the owner can escape the forfeiture. Besides, this is an es-

sential part of the whole scheme of the act, and it cannot be presumed that the Legislature would have passed the act without this. The forfeiture of the titles of the owners is the purpose of the act. There could not be a clearer case of legislative intention to punish retrospectively." Record No. 223, fols. 316-318.

Thus Judge Hobson, in Case 223, had already answered the contention of the Court on this point in Case No. 224 as already stated (*supra*, p. 88); and the same contention had been already answered by the petition for rehearing in which the decisions in Muir *vs.* Bardstown—O'Donoghue *v.* Akin and Hoke *vs.* Commonwealth on the one hand and cases of merely retrospective taxation on the other had been pointed out to the Court (Record No. 223, fols. 282-286).

Referring to the already cited case of Shaw *v.* Robinson (*supra*, p. 82), it was said by counsel for another defendant, on the hearing of Case No. 223:

> "As to the *ex post facto* features of the two statutes the only difference between the statute there considered and the statute in question here is that the statute considered in that case provides for a forfeiture only for failure to pay taxes for twenty years in the past, and makes no provision for extinguishing the cause of forfeiture, while the statute we are now considering provides for a forfeiture for failure to list for three years in the past, and provides that the forfeiture may be extinguished by listing the land and paying the taxes together with interest and certain penalties within a time named. As we have already seen, the provision for extinguishing the cause of forfeiture is void because of the requirement of payment of penalties for which no provision was made at the time of the omission to list, and there being no valid provision for extinguishing the cause of forfeiture the statute is as much an *ex post facto* statute as the statute held unconstitutional in Shaw *v.* Robinson."

(2) This Article III is also void when attempted to be enforced against plaintiff in error, because plaintiff in error was a subsequent purchaser.

(*a*) It has been already shown that both by the letter and spirit of the Article the penalty is in truth for an alleged delinquency prior to the act which is the so called "cause" of a forfeiture and any failure or "delinquency"

after the act is not "cause" but a failure to extinguish a "cause" (*supra*, pp. 8-9).

(*b*) Even if this were not true, the Legislature could not forfeit the land of plaintiff in error for failure to pay a debt or due which, if it existed at all, was not that of plaintiff in error nor even a lien on the land at the time of the purchase by plaintiff in error.

The facts regarding the acquisition of title by plaintiff in error are set forth in its Amended Answer (*supra*, pp. 24-25) where it appears that prior to its incorporation on February 6, 1906, much time had been spent by its subsequent grantor and his associates with a view of settling titles to land in this locality by consolidating under one ownership the title under the ancient patents with the claims by adverse possession; and that on February 8, 1906 (prior to the enactment of Article III) plaintiff in error had entered into an agreement to purchase titles already so acquired and others thereafter to be acquired in pursuance of this plan; and that on the 21st and 24th of December, 1906, it received deeds conveying the legal title (Record No. 224, fols. 238-242).

It had been already shown by the petitions to list that the plaintiff in error did not acquire the legal title until December 21, 1906 (Record No. 223, fols. 19, 55, 80, 111) *i. e.* more than 15 months after Sept. 1, 1905, the latest of the dates named in Article III as when taxes "should have been paid."

These petitions to list were part of the proceedings in case No. 223, which were made part of the original answer in case No. 224 (Record No. 224, fol. 217) and filed and received by the trial Court as an exhibit (Record No. 224, fol. 236), although not permitted to be read to the jury (*Id.*, fols. 303-304), but referred to by the Court of Appeals as being filed with that Answer (*Id.*, fol. 341).

The Amended Answer expressly pleaded that plaintiff in error was not an owner before or during any of the years of alleged delinquency (Record No. 224, fol. 241).

The plaintiff in error had contracted to purchase some of these lands prior to the enactment of Article III, but after the latest of dates of alleged delinquency, and did not receive its deeds till a week or ten days before the ex-

piration of the period granted to "extinguish" the attempted forfeiture (*supra*, p. 25).

Ky. Gen. Stats. of 1873, Ch. 92, Art. I., Section 2, incorporating the provision which had formerly existed in favor of a "perpetual lien of the State for taxes," was amended by Act of 1886, so as to provide that the lien of the Commonwealth *should not exist longer than five years.*

Section 4021 of Ky. Stats. is a further amendment of the same provisions, and adds that "When any lands or "improvements shall not be assessed in any one year, it "may be assessed retrospectively in the manner provided "by law for that year at any time not later than five "years thereafter, *but the lien thereby accruing shall not "prejudice the rights of purchasers acquired in the mean-"time.*"

This provision against prejudice of purchaser by retrospective assessment was added by Act March 15, 1894—Acts 1894, Ch. 67, p. 166; amending Acts 1891-2-3, p. 278.

"It is the policy of the law to put at rest stale demands of whatever character. *This applies as well to taxes as to other matters.*"

So said Judge O'Rear, in 1903, delivering the opinion of the Court of Appeals of Kentucky.

Chicago, etc., Co. *v.* Commonwealth, 115 Ky., 278; 24 R., 2124.

"It will be noted that the subject in hand and under treatment by the sections last quoted is the one of the lien of the taxing district, or State, even after the property has passed into the hands of others owning it when it should have been assessed."

"The last clause of Section 4021 (of Ky. Stats.) referring to the power of the State to assess omitted property for back taxes for five years, must be understood to refer to that class of property. That section recognizes, as does the act of 1890, that the right to assess omitted property is limited to five years from the time when it should been assessed. This limitation is found in Section 2523, 2515 and 469 of Kentucky Statutes above quoted . . . We are of opinion that a proceeding to compel a taxpayer to list property for any one year is such a proceeding as is embraced in the statute *supra* and if not begun in the proper court within five years from the time when the action could first have been instituted the State is barred of her right to thereafter

maintain the action." (1903—Chicago, etc., Co. *v.* Comm., 115 Ky., 278; 24 R., 2124, 2126; Opinion by Judge O'Rear).

"It will be observed that this section is preserving the State's lien for taxes and *protecting innocent purchasers*" (Opinion by Judge Nunn, in Commonwealth *vs.* Nute, 115 Ky., 239; 24 R., 2138, 2140).

Neither the Federal nor State Governments attempt to make a purchaser of land personally liable for arrears of taxes assessed before his purchase. See Alexandria *v.* Preston, 8 Cranch, 53.

"Taxes on unimproved and unseated lands of non-residents are usually imposed upon the lands as such, the tax constituting a lien upon the land, *but creating no personal charge against the owner*" (25 Am. & Eng. Encyc. L., 1st ed., p. 127).

"The State has no jurisdiction to assess a tax as a personal charge against a non-resident, nor as a general rule can the personalty of a non-resident be taxed unless it has an actual situs within the State (1 Cooley on Taxation, pp. 24, 25, 84–86, 641; Code 1904, §§ 487, 489)" (1909, Pendleton *v.* Commonwealth (Va.), 65 S. E., 536, 537).

"Taxes are not liens unless declared so by the Legislature under whose authority they are assessed. Still less can a lien be created by the mere duty to assess taxes which has not been performed" Head note.—Heine *v.* Board of Levee Comm'rs., 19 Wall., 655.

Under Ky. Gen. Stat., c. 92, Art. I, Sec. 2, that the lien for taxes shall not exist for more than 5 years a judgment for taxes does not extend lien altho the ordinary lien of judgment is 15 years (Ky. Cent. Ry. Co. *v.* Comm., 92 Ky., 64; 17 S. W., 196).

The Court of Appeals a few months ago reversed a judgment recovered by the City of Frankfort for taxes on real estate because the judgment included in the recovery taxes for the years 1897, 1898, 1899, 1900 and 1901 . . . barred by the Statute of Limitations (Ky. Ct. App., Oct., 1909, Morgan *v.* Board of Councilmen of City of Frankfort, 121 S. W., 1033, 1034).

"Taxes against a man not being a lien on his wife's property, a sale of such property for such taxes is void."

Ky. Ct. App., 1908, in Brocking *v.* O'Bryan, 112 S. W., 631, 632.

"The Commonwealth has a lien for a tax due it on the property assessed only by virtue of the statute; by the terms of the statute such a lien exists only where there has been a properly assessed tax, and only for a period of five years. A mere common law judgment in favor of the Commonwealth against a railroad company, for the amount of taxes due for several years, does not create or fix any lien on such railroad property, the lien existing by virtue of the statute, if at all."

HEAD NOTE—Kentucky Central R. R. Co. *v.* Commonwealth, 13 Ky. Law Repr., p. 484.

So, too, without express statutory provision, a remainderman and a purchaser from him "is entitled to receive "the property free from all charges [for taxes] which the "law casts upon the life tenant."

1901—Brodie *vs.* Parsons, 23 Ky. L. R., 831, 833 (64 S. W., 426)—Opinion by Judge Hobson.

But even prior to the amendment of 1894 there was no lien whatever if the taxes had not been assessed, even if the taxes should have been assessed; and a purchaser took the property free from any lien for taxes which should have been but had not been assessed, although a judgment for the amount of the taxes had been entered.

1891—Kentucky Central R. R. Co. *v.* Commonwealth, 92 Ky., 64; 13 Ky. L. Repr., 484, 17 S. W., 196.

And even if there be such a lien against one remaining the owner it would be a lien making the lands subject to sale and on which the purchaser could protect himself by paying the tax or buying in the property, or, if he failed to do either, he would be entitled to the surplus proceeds of sale. It would be impossible under any principles of Constitutional law to turn this lien into a "cause of forfeiture" by an act passed after the delinquency.

A fortiori this would be impossible where no taxes had been assessed, and where the land had been purchased by others from the delinquent.

A proceeding brought by the commissioner of school lands in 1882 to forfeit a tract of land in the name of the original owner, who had, in fact, conveyed it to others in 1797, held *coram non judice* and void (Lasher *v.* McCreery (C. C.), 66 Fed., 834).

Upon this point in a Brief bearing the name of the Attorney-General, submitted to the Court of Appeals on the Argument of Case No. 223, it was said:

"Not only does the statute prescribe a forfeiture for the failure of the claimant to list—but also for a like failure on the part of *his predecessor in title. The State has never had a lien for taxes until they were assessed*, and yet one who has purchased land in the past, relying upon the fact that all taxes assessed have been paid, as he had the right to do when he purchased, may now be required to give up his land because of his vendor's omission to list, unless he pays taxes and penalties which he had no reason to believe, when he purchased, that he would ever have to pay, it being then provided by Section 4021 of the Kentucky Statutes that *a retrospective assessment should not prejudice the rights of purchasers acquired in the meantime.*"

"This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime *not committed by himself, but by those from whom be purchased.* This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why then, is it allowable in the form of a law annulling the original grant?" (Fletcher *v.* Peck, 6 Cranch, 87).

This "Article III" is not an exercise of the "police power" (*infra*, p. 261). But even if it were, it would be void as an *ex post facto* law. The police power does not transcend the prohibition of *ex post facto* laws (*Id.*, p. 265).

"It follows, therefore, that all persons who built on their own soil before these laws, in a manner not amounting to a public nuisance, independently of them, had exercised only their just and lawful right; and any laws made to punish acts lawful at the time they were done, would be *ex post facto*, contrary to the Constitution and to the plainest principles of justice and of course inoperative and void."

Mr. Chief Justice Shaw in Commonwealth *v.* Alger, 7 Cush., 53; also in Thayer, Cas. Const. Law, Vol I, p. 693, 705. (See other cases on this point, *infra*, p. 265.)

II.

Article III violates the Compact between Virginia and Kentucky, which provides that all private rights and interests of lands within Kentucky derived from the laws of Virginia prior to the separation of Kentucky from Virginia shall remain "valid and secure" under the laws of Kentucky, and shall be determined by the laws existing on the 18th day of December, 1789, in Virginia.

"If a contract when made was valid by the constitution and laws of the State, as then expounded by highest State Authorities, no subsequent action by State Legislature or Judiciary can impair its obligations."

Mr. Justice Swayne in
Havemeyer v. *Iowa Co., 3 Wall., 304.*

"Nor can it be inconsistent with the dignity of a sovereign state to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a state of the Union. On the contrary, the highest honor of sovereignty is untarnished faith."

Mr. Chief Justice Taney in
Ableman v. *Booth, 20 How., 524.*

This objection was argued at the original hearing of Case No. 223 (fol. 175), was again pressed in the petition for rehearing (*Id.*, fols. 261, 262), is contained in the amended answer in Case No. 224 (fol. 244) and in the assignments of error of Case No. 223 (fol. 323), and of Case No. 224 (fol. 347).

The rights secured by this compact are under the protection of this Court (*a*) because the National Constitution prohibits the impairment of its obligation (*infra*, p. 179), and also (*b*) because the compact is "a law of the Union" (*infra*, pp. 144).

This compact is contained in an act of the General Assembly of Virginia, entitled "An Act concerning the erection of the District of Kentucky into an independent State". Approved December 18, 1789, which begins by reciting that

> "Whereas it is represented to this present General Assembly, that the act of last session, entitled 'An act concerning the erection of the District of Kentucky into an independent State,' which contains terms materially different from those of the act of October session 1785, are found incompatible with the real views of this Commonwealth, as well as injurious to the good people of the said district."

Then the first four sections provide for the holding of a convention of the inhabitants of the district "to consider and determine whether it be expedient for, and the will of the good people of the said district, that the same be erected into an independent State, on the terms and conditions following:

> "Section 5, First, that the boundary between the proposed State and Virginia shall remain the same as at present separates the district from the residue of this Commonwealth.
>
> Section 6. Second, that the proposed State shall take upon itself a just proportion of the debt of the United States, and the payment of all the certificates granted on account of the several expeditions carried on from the Kentucky district against the Indians, since the first day of January, 1785.
>
> Section 7. *Third, that all private rights and interests of lands within the said district, derived from the laws of Virginia prior to such separation, shall remain valid*

and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State.

Section 8. Fourth, that the lands within the proposed State of non-resident proprietors shall not in any case be taxed higher than the lands of residents, at any time prior to the admission of the proposed State to a vote by its delegates in Congress, where such non-residents reside out of the United States, nor at any time, either before or after such admission, when such non-residents reside within this Commonwealth, within which this stipula- shall be reciprocal; or where such non-residents reside within any other of the United States, which shall declare the same to be reciprocal within its limits; nor shall a neglect of cultivation or improvement of any land within either the proposed State or this Commonwealth, belonging to non-residents, citizens of the other, subject such non-residents to forfeiture or other penalty, within the term of six years, after the admission of the said State into the Federal Union.

Section 9. Fifth, that *no grant of land or land warrant to be issued by the proposed State, shall interfere* with any warrant heretofore issued from the land office of Virginia, which shall be located on land within the said district, now liable thereto, on or before the first day of September, 1791.

The 10th section relates to lands in the district appropriated for military or other services in the more westerly parts of Kentucky, and do not affect the locality in which are the lands of plaintiff in error. The 11th section relates to the navigation of and jurisdiction over the Ohio river. The 12th section is as follows:

"Section 12. Eighth, that in case any complaint or dispute shall at any time arise between the Commonwealth of Virginia and the said district, after it shall be an independent State, concerning the meaning or execution of the forogoing articles, the same shall be determined by six commissioners, of whom two shall be chosen by each of the parties, and the remainder by the commissioners so first appointed.

The 13th section relates to the proceedings, etc., of the convention under the Act. The 14th, 15th and 16th sections are as follows:

"Section 14. And be it further enacted, That if the said convention shall approve of the erection of the said district into an independent State on the foregoing

terms and conditions, they shall and may proceed to fix a day posterior to the first day of November, 1791, on which the authority of this Commonwealth, and of its laws, under the exceptions aforesaid, shall cease and determine forever over the proposed State, and the said articles become a *solemn compact mutually binding on the parties, and unalterable by either without the consent of the other.*

"Section 15. Provided, however, That prior to the first day of November, 1791, the general government of the United States shall assent to the erection of the said district into an independent State, shall release this Commonwealth from all its federal obligations arising from the said district as being part thereof, and shall agree that the proposed State shall immediately after the day to be fixed as aforesaid posterior to the first day of November, 1791, or at some convenient time future thereto, be admitted into the Federal Union.

"Section 16. And to the end that no period of anarchy may happen to the good people of the proposed State, it is to be understood that the said convention shall have authority to take the necessary provisional measures for the election and meeting of a convention, at some time prior to the day fixed for the determination of the authority of this Commonwealth, and of its laws over said district, and posterior to the first day of November, 1791, aforesaid, with full power and authority to frame and establish a fundamental constitution of government for the proposed State, and to declare what laws shall be in force therein until the same shall be abrogated or altered by the legislative authority acting under the constitution so to be framed and established."

The 17th Section exempts the electors and members of the Convention from arrest; and the final (18th) section directs that the act be transmitted by the executive to the Commonwealth's representatives in Congress, "who are hereby instructed to use their endeavors to obtain from Congress a speedy act to the effect above specified."

The entire Compact has been published many times among which in 13 Hening, Stat. Va. 17; Rev. Code, Va. 1819, Vol. 1, p. 57; 1 Litt. L. Ky. 17; Rev. Stat. Ky. 1852, p. 23; Gen. Stat. Ky. Bul. & Fel. ed., p. 51; Ky. Stats. (Carroll) 1903, p. 43.

This was the fourth and at last successful effort of Virginia to comply with the wishes of the citizens of Ken-

tucky. The reasons for the failures of prior efforts will be found stated in the Histories of Kentucky (e. g. Collins, Vol., 1, chap. 2; McElroy, *infra*), from which it will appear how little foundation there is for the surmise of the Kentucky Court of Appeals in the cases at bar that "perhaps the delay experienced by the Kentucky pioneers in obtaining the consent of the Mother State" "was due to the influence" of the patentees (Record No. 223, fol. 153) whose title that Court now seeks to forfeit.

The First Enabling Act was passed Jan'y. 10, 1786 (12 Hening, 37). It is referred to in McElroy, Ky. in Nation's Hist., page 129; also in Marshall's Hist'y. Ky., Edit. of 1824, Vol. I, pp. 223–4. Among the conditions one was that the Kentucky convention should fix a date prior to Sept. 1, 1787, when Virginia's authority should cease and that Congress prior to June 1, 1787, should consent.

The Second Enabling Act Jan'y. 10, 1787 (12 Hening 240), modified the term of "First" at the request of Kentuckians presented by Chief Justice Marshall who was then of the Virginia Assembly, and postponed Act of separation till Jan'y, 1789, and fixed July 4, 1788, as the date prior to which Congress should consent (McElroy, p. 131).

The action of the Congress of the Confederation having made it impossible for Kentucky to fulfill the conditions of separation laid down in the Second Enabling Act (McElroy Op. cit. at p. 141), the Virginia Assembly passed a

"*Third Enabling Act*" *Dec. 29, 1788*, (12 Hening, p. 788) "showing very clearly that Virginia was perfectly willing to secure the regular separation of Kentucky as soon as possible. This Act however caused general dissatisfaction, by reason of two conditions that were looked upon as unjust and uncalled for. The first which proposed to subject the new State to payment of a portion of the domestic debt of Virginia then existing, seems fair enough when we consider that a large part of the debt had been incurred by military expeditions on account of the District, and since the passage of the First Enabling Act; but the second had no such justification. It proposed

that the new State should continue dependent upon Virginia as to the time for completing the titles and surveys to lands given to officers and soldiers by Virginia. This seemed to allow only for the creation of a partially independent State (Marshall, 1824 Ed., Vol. I, p. 342), and the resentment which it aroused was, therefore, just" (McElroy, Op. cit., p. 142).

"The General Assembly of Virginia having carefully considered these remonstrances and having decided that they were just, passed a Fourth Enabling Act which contained practically the same conditions as had been laid down in the first two, but which omitted the two provisions contained in the third, to which the Assembly and people (of Kentucky) had made such vigorous objections" (*Id.*, p. 143). This "Fourth Enabling Act" is that hereinabove quoted as the Compact of December 18, 1789 (Hening Stats. Va., Vol 13, p. 17).

In the valuable work of Prof. McElroy above cited, there is a misprint which refers to Vol. 12 instead of Vol 13 of Hening, p. 17, containing the Compact; and a slight error in the last foregoing quotation. The Compact of December 18, 1789, in so far as it relates to assumption by Kentucky of part of the public debt of Virginia, is a further indulgence by the Mother State to her daughter. The first enabling act (of January 10, 1786) and second (of January 10, 1787) as well as the third (of December 29, 1788) were alike in requiring "that the proposed State shall take upon itself a just proportion of the public debt of the Commonwealth" (Hening, Vol. 12, pp. 38, 241 and 789). In the fourth enabling act, *i.e.*, the Actual Compact of December 18, 1789, this was modified so as to read "that the proposed State shall take upon itself a just proportion of the debt of the United States, and the payment of all certificates granted on account of the several expeditions carried on from Kentucky district against the Indians since the 1st day of January, 1785."

The further indulgence by which the provision intended to protect the officers and soldiers of the Revolution was stricken out, was afterwards used by Kentucky in a way of which Virginia bitterly complained in 1824 (*infra*, p. 106).

But what more nearly concerns the cases now at bar, is that *the first, second and third enabling acts, one after the other, repeat in the same words (except the dates) the provisions contained in the Seventh and Ninth Sections (Third and Fifth Articles) of the Compact actually adopted, viz.: that the "private rights and interests" "shall remain valid and secure" and be determined by the laws of Virginia at that date, and that no grant of land or warrant issued by the proposed State shall "interfere" with land warrants theretofore issued by Virginia and located before the date there stated* (*supra*, pp. 97-98).

This surely shows a settled and deliberate requirement of Virginia, and it is just this requirement that Article III of the Kentucky Act of 1906 seeks by devious ways to be rid of.

The Act of Congress, Feb'y 4, 1791, after reciting that by the foregoing Act of Dec'r 18, 1789, the Legislature of Virginia had "consented that the District of Kentucky, within the jurisdiction of the said Commonwealth, and according to its actual boundaries at the time of passing the act aforesaid, should be formed into a new State;" "and that a convention of delegates, chosen by the people of the said District of Kentucky, have petitioned Congress to consent," enacted and declared "That the Congress doth consent that the said District of Kentucky, within the jurisdiction of the Commonwealth of Virginia, according to its actual boundaries on the 18th day of December, 1789, shall upon the 1st day of June, 1792, be formed into a new State," and be admitted into the Union (1 U. S. Stat., 189).

This act of Congress is in itself the evidence of the consent required by U. S. Constitution, Art. 1, Section 10, par. 3 to validate an agreement between two of the States (Green *v.* Biddle, 8 Wheat 87; Wharton *v.* Wise, 153 U. S. 153, 173; Virginia *v.* Tennessee, 148 U. S. 518).

"Under the confederation the States were free to settle their controversies of any kind whatever by compact or agreement; under the Constitution they can enter into none without the consent of Congress, in the exercise of its political power, thus making an amicable adjustment a political matter for the concurring determination

of the States and Congress, and *its construction a matter of judicial cognizance* by any court to which the appropriate resort may be had, by the judiciary act."

Rhode Island *v.* Massachusetts, 12 Peters, 727, 730.

In the brief submitted on the hearing of Case No. 223 in the Court of Appeals, plaintiff in error had quoted *verbatim* the hereinabove set forth 7th, 9th, 10th and 14th sections of this Compact, and had said:

"This 'Compact' was a contract within the meaning of the clause of the Federal Constitution, prohibiting any State from enacting any law impairing the obligation of contracts, and the United States courts are in duty bound to declare void any acts of the Legislature of Kentucky, and to disregard any decisions of Kentucky courts which are contrary to or impair the obligation of the above cited provision of the 'Compact.' Such is 'the law of the land' as declared by the Supreme Court of the United States in the year 1823 in the leading case of Green *vs.* Biddle (8 Wheaton, 1–108), which has been often since cited by that Court and the other courts of the United States.

In this decision the Court expressly holds not only that the Virginia surveys and patents for this land must be held to be valid, but that the 'rights and interests' under them must not be impaired.

"Although the Supreme Court of the United States has held that the Virginia Compact did not prevent the Commonwealth of Kentucky from enacting the seven years law of Limitation, and the courts of Kentucky have refused to recognize the authority of the decision of the Supreme Court of the United States in Green *vs.* Biddle, as binding on the courts of Kentucky, so far as the question of the claims of settlers under the 'Occupying Claimants Law' of January 31, 1812, were concerned (28 Ky., 315), yet the Supreme Court has not receded from its decision in Green *vs.* Biddle, which, as already stated, has often been cited on various points in later decisions of that court; and neither the Legislature nor the courts of Kentucky have ever sought to repudiate the Compact nor to question its validity although differing from the Supreme Court regarding its construction and the extent of its application. . . .

"If any one whose claims are interfered with by the rights of others under patents from Virginia can have such rights 'extinguished' by such 'laws' as Article III (undreamed of at the time the Compact was made), what possible 'rights and interests' remain 'valid or

secure' to 'be determined by the laws now (in 1789) existing in this State (Virginia)'? Is the 'solemn compact' to be reduced to a solemn mockery?"

In the same brief the plaintiff in error also showed that except in regard to the occupying claimant law the Court of Appeals had generally respected the Compact.

And in support of these contentions then cited many of the cases both of this Court and of the Court of Appeals that are hereinafter cited.

It was in answer to these contentions that the Court copied the same sections into its Opinion and referred to a few of the cases cited and said in the Opinion in case No. 223:

"No one seems to have thought before that the power of the sovereign State of Kentucky was, or was intended to be, curtailed by the compact with Virginia respecting the right of the former to proceed in her own way to coerce taxes from all property within her dominion for her support." . . . "The compact no more prevents the State from forfeiting the title of property whose owners refuse to list it and pay taxes upon it than it denies to the State the power to levy the taxes" (Record No. 223, fols. 179–180).

In answer to this it was said in the petition for rehearing:

"If this contains an implication that counsel for appellant have claimed that the compact prevented Kentucky from forfeiting titles for failure to list or pay taxes on land, no matter what the conditions of delinquency and no matter what the conditions precedent and requisite before forfeiture should be effected, the statement is unfair, as no claim of that kind has been made. What appellant contends is that both Article III of the Revenue Act of 1906 and the attempts, administrative or judicial, to enforce it are null and void under the provision of the Federal Constitution which prohibits any State from passing any law impairing the obligation of contracts, and that this article impairs the obligation of the Compact with Virginia, and also the contracts between Virginia and the patentees under whom appellant claims title, which contracts the Compact with Virginia was intended to protect; and that this constitutional prohibition applies to all laws made after the National Constitution became effective in 1789, whether the contracts were made prior to or after that date; and applies not only to legis-

lative enactments but also to judicial decisions impairing such contracts (Appellant's Brief, p. 63). Appellant respectly denies that "whatever Virginia could have done in subsequent legislation as affecting the titles in question" (if the Compact had not been made), "Kentucky might also do," notwithstanding the Compact (Opinion, p. 149); and respectfully dissents from the statement that the decisions sustain such a statement; and also respectfully denies that Virginia at the time of the separation had provided a forfeiture of titles for failure to list lands for taxation" (Record No. 223, fols. 261-2).

It is notable here that the Court seems to seek to evade the Compact on the plea of the needs of revenue, whereas the Court itself has said and the proceedings under this Article III show by the rigor of the requirements and the refusal to accept the offer to pay taxes (*supra*, p. 34) that what was really intended was not to increase the State's revenue but to "outlaw" titles derived from Virginia.

In the later action (No. 224) the plaintiff in error in its Amended Answer reiterated its contention that Article III of this revenue act was a violation of the National Constitution because it was a violation of the Virginia Compact (Record No. 224, fol. 244) and on the hearing of the Appeal in case No. 224 again argued in support of its contention and referred to the pages of its Brief and Petition for Rehearing on the appeal in case No. 223 and the authorities there cited, to which it added more authorities in its Brief on the hearing of Case No. 224.

The Court, however, in the Opinion in case No. 224 adds nothing on this point to what it had said in Case No. 223.

The discussion of the Opinion of the Court on this question in Case No. 223 is referred to herein below (p. 158).

As relating to the construction of the meaning of this Compact the here following summary of its history (1) in the General Assembly of Virginia, (2) in the General Assembly and Courts of Kentucky and (3) in this Court, is respectfully submitted, as showing how it has been heretofore construed and to explain why it seems to have been sometimes misconstrued.

(1) In the General Assembly of Virginia.

The Legislature of Virginia that fixed the terms of this Compact was not a novice in the art of making compacts, and did not frame this one without ample time for weighing the meaning of its words.

In 1779–1780 it had entered into a Compact with Pennsylvania (10 Hening Stats., 534–5, 11 *Id.*, 554–6), in 1783–1785 a compact with the United States ceding the "Northwest territory" (Handley *v.* Anthony, 5 Wheat., 375) and the first edition of the proposed Compact with Kentucky passed the Legislature of Virginia in 1786 (12 Hening, 37) shortly before the ratification of a compact with Maryland (*Id.*, p. 50); and again in January, 1787 (*Id.*, 240); and again in December, 1788 (*Id.*, p. 788); and again and finally on December 18, 1789 (13 *Id.*, 17), followed by a resolution of December 6, 1790, asking Congress to ratify the Compact (*Id.*, p. 236).

A "*Report and resolutions in relation to the Military lands in the State of Kentucky*" March 2, 1822 (before the final decision in Green *v.* Biddle), was agreed to by both Houses of Assembly of Virginia (Va. Laws 1821–2, pp. 93–111). It contains a very long historical review of the legislation of Virginia touching the claims of the officers and soldiers of the Revolution for bounties in land; complains that Kentucky in November, 1792, had passed an act declaring all entries made since May 1, 1792, either on Virginia treasury warrants or on Virginia military warrants and surveys and patents thereunder to be void (*Id.*, p. 98) and that although there were estimated to be over half a million acres of military warrants unsatisfied "pursuant to the solemn engagements of Virginia to the troops of the Revolution, Kentucky had made no provision for their satisfaction, but had made provision for disposing of these land for the public benefit" (*Id.*, p. 101), points out the superior equities of military warrants, and claims that the owner has an "interest in land" and says:

> "The third article (*i. e.*, 7th Section) of the Compact contained in this act speaks a language which cannot well be misunderstood in its application to this subject. What means the *validity and security under the laws of the proposed State*, which is assured by that article to *all private rights and interests* in lands within the

said District, derived from the laws of Virginia prior to the separation?

"That this article was intended to embrace the inchoate and equitable as well as the complete and legal rights of individuals, cannot be questioned. Kentucky herself has always regarded it as embracing inchoate rights and as imposing on her the obligation to enact laws to perfect them. She has accordingly enacted laws for consummating such inchoate rights as she recognized. And why is not this right also recognized? It is a private right to land within the District of Kentucky, and it was acquired under the laws of Virginia before the separation. The reason is to be found in the circumstance that the right is unlocated. But this reason can derive no countenance from anything in the third article of the Compact. That distinguishes not between located and unlocated rights but guarantees all rights that have attached, within the District of Kentucky" (*Id.*, pp. 104–105).

The resolutions then go on to claim that as Virginia before the separation had been obligated to appropriate lands in Kentucky under these military warrants, Kentucky should fulfill the obligation. The cases now at bar are not concerned with military warrants, as under the Virginia laws these were to be satisfied out of designated lands in the western and southern parts of Kentucky. But the resolutions are here referred to as indicating the spirit in which one of the parties to the Compact thought it should be observed as compared with the way the other party was acting.

(2) In the General Assembly and Courts of Kentucky.

On the 20th of July, 1790, a convention called for the express purpose of accepting or rejecting the terms of separation offered by the Virginia Act of December 18th, 1789, met at Danville, and resolved without difficulty, "*that it was expedient for, and the will of the good people of the District of Kentucky, that the same be erected into an independent State, on the terms and conditions specified in an Act of the Virginia Assembly passed the 18th day of December, 1789*, entitled 'An Act concerning the erection of the District of Kentucky into an independent State.'"

This action was reported back to Virginia by a committee of the Danville Convention, and accepted by Virginia, and on the basis of it united action made to secure the admission of the State of Kentucky into the Union.

The first three constitutions of Kentucky declared that:

> "The compact with the State of Virginia subject to such alterations as may be made therein, agreeably to the mode prescribed by the said compact shall be considered as part of this Constitution."
>
> Ky. Const. 1792, Art. VIII, Sec. 7 (1 Litt. L. 32).
>
> Ky. Const. 1799, Art. VI, Sec. 9 (1 Litt. L. 51).
>
> Ky. Const. 1850, Art. VIII, Sec. 9 (Ky. Stats. (Carroll, 1903), p. 78).

The first section of the schedule adopted with the Kentucky Constitution of 1792 provided that "*all rights*, actions, prosecutions, claims and contracts, as well of individuals as of bodies corporate, shall continue *as if the said government had not been established.*"

But if it had not appeared in any of them it would not, could not, alter the terms and conditions of this contract so solemnly made.

In addition each Constitution of Kentucky, from 1792 to 1891, contained the guarantee of "remedy by due process of law" and has forbidden the passage of any act "impairing the obligation of contracts" similar in form to those contained in the Constitution of the United States.

The Compact and the laws of Virginia early came up for consideration in the Kentucky Courts.

In 1810 a Kentucky Statute of limitations of 1796 modeled on that of Virginia and not repealed till 1814, was construed as not to begin to run until the plaintiff came within the State. Graves *vs.* Graves, 5 Ky. (2 Bibb.), 207. In 1815 the "Occupying Claimants" law of 1812 was held not contrary to the Compact; but the Court admits that the Compact

> "was intended to secure to claimants of lands their rights and interests therein by preserving a determination of their titles by the laws under which they were acquired . . . Whatever doubts might have been

entertained upon the construction of the compact were this a case of first impression, when the authority of the legislature has been acquiesced in and approved by the current decisions ever since the passage of the first law upon the subject we are not at this time disposed to depart from the authority of those cases." Fowler *v.* Halbert, 7 Ky. (4 Bibb), 52, at p. 55.

In 1819 an act of 1816 prohibiting the Register of the land office from carrying a plat or certificate into grant unless the surveyor shall certify that objects called for by the entry are embraced in the survey, was held not to be against the Compact, because the Compact, which the Court declares "is considered part of the Constitution of the State," made greater restrictions. Register *v.* Haggin, 8 Ky. (1 Mar.), 445, 446.

In 1819, the Court held that the Compact did not prevent Kentucky from shortening the Statute of limitations from 20 to 7 years; and in the course of the opinion, after quoting the 7th section of the Compact, the Court says:

"According to the clear import of this section, in order to ascertain whether those claiming under the laws of Virginia, had, *at the time of the separation*, an interest or right to lands lying within this state, *there is no question but that the laws of that state, regardless of any declaratory or explanatory laws, which may be enacted by this country, and those only, should form the rule of decision.*

"But whilst the legislative enactments of this country, are by the compact, not permitted to affect the validity of those rights, we are of opinion that instrument should not be construed so as to preclude the legislature from either regulating the *mode of action* or *limiting the time* it should be prosecuted, for the purpose of asserting those rights.

"That the section alluded to, was not understood by the parties to that compact, as inhibiting the legislature from passing laws by which those rights might become forfeited, is, we apprehend, apparent from other parts of that instrument. For it is, furthermore, in the latter clause of the eighth section provided, that no neglect of cultivation or improvement of any land, within either the proposed State or that of Virginia belonging to the non-resident citizen of the other, shall subject such non-resident to forfeiture or other penalty, within the term of six years, &c.

"Now, as by the *then* laws of Virginia, lands were not, either for a failure to improve, or cultivate, subject to forfeiture, it is obvious, that the members of the compact must have understood the seventh section as not furnishing any restraint against the legislature imposing such a forfeiture, and that the clause cited from the eighth section, was introduced for the purpose of supplying what was not contained in the seventh, and restraining, for the time therein mentioned, the exercise of such an authority.

"If then, notwithstanding the compact, laws of forfeiture may be enacted, no reason is perceived why the legislature should not be allowed to regulate the limitation of actions.

"For although possession may, in process of time, ripen into a perfect right to the land, it does so, under the efficacy of the laws of limitations, operating in the nature of a forfeiture upon the failure of the claimant in not asserting his right in due time" (Kendall *v.* Slaughter, 8 Ky., 1 Mar., 374, 378).

In this last cited case the Court also bases its argument on the cases sustaining an extension of the time to make surveys and sustaining the Champerty Act as not being against the Compact, but it appears that the decision was based largely on the supposition of the Court that at the time of the Compact "lands were not either for failure to improve or cultivate subject to forfeiture." The contrary, it is submitted, was true as hereinafter shown (*infra*, pp. 159–162).

In 1817 the Kentucky Act of 1792 confirming patents issued to dead persons and vesting title in their heirs was held not to be against the Compact (Hansford *v.* Minor, 7 Ky. (4 Bibb.), 385).

In the same year the question was raised by the Court, but not decided, whether the act of Kentucky Legislature of 1814, "repealing the saving in the Statute of Limitations in favor of persons out of this commonwealth (Kentucky), should be deemed unconstitutional as being contrary to the compact between Virginia and Kentucky" "in relation to the citizens of any other State or country than that of Virginia." Nelson *vs.* Wilson, 7 Ky. (4 Bibb), 561. In 1819 the Court said that "upon the principle recognized by this Court in the case of Kendal *v.* Slaughter, decided at the fall term 1818, it follows that no provi-

sion either of the compact with the State of Virginia, or the constitution of this State or that of the United States, is contravened by the passage of the act of 1808 concerning the limitation of action relating to land claims derived from Virginia" (Clay *v.* Fox, 8 Ky. (I Mar.), 557).

But a few years later the Court (after again quoting the 7th Section of the Compact) said:

"To extend relief to the appellants under the Act of 1792 would not only be determining by the laws of this country, instead of those in Virginia, *in force at the separation*, the right of Myers derived under the laws of that State, but would, moreover, be prostrating that right which, by the compact, is required to remain *valid and secure.*" (McCracken *vs.* Beall, 10 Ky. (3 Mar.), at p. 212).

In 1822 it was held that under the Compact the Kentucky Act of 1797, saving the rights of infants and *femes covert*, when it prejudiced Virginia claimants could not avail against the Virginia Statute of 1785, but was valid as far as it operates to the prejudice of the State of Kentucky alone. (Hoy *vs.* McMurray, 11 Ky. (1 Litt.), 364). The following year the Act of 1814, referred to in Nelson *v.* Wilson (*supra*), was sustained (Luckett *v.* Dunn, 13 Ky. (3 Litt.), 218).

About this time the gospel of repudiation of other obligations besides those under the Compact was spreading rapidly in Kentucky (McElroy, Kentucky in the Nation's History, p. 393; Collins' Hist. Ky., Vol. I, p. 320).

In 1822 the Legislature of Kentucky provided for the appointment of Commissioners to meet Commissioners from Virginia "to constitute a Board of Commissioners under the 8th article of the Compact with said State" (Ky. Acts, 1822, p. 248), and at its next session the Legisture adopted very long resolutions criticizing the decision of the Supreme Court of the United States in Green *vs.* Biddle at the same time with certain decisions of the Court of Appeals of Kentucky (Ky. Acts, 1823, pp. 488–515, 516), and passed an Act reviving the Champerty law and repealing the Act of 1796, which had made the law of Champerty inapplicable to titles originating from Virginia. This act of revivor goes farther than its title, and after reciting that evils of land titles derived from Virginia resulted

from "undigested and misconceived plan of Virginia," and that the Supreme Court of the United States (in Green *v.* Biddle) had declared that Kentucky's occupying claimant law was contrary to the Virginia Compact, and hence unconstitutional; and that Virginia had refused to appoint Commissioners under the 8th section of the Compact to determine the disputes about the meaning of the Compact, the Act thereupon declares that Kentucky is "reluctantly" compelled to enact forfeitures for want of cultivation and improvement (Ky. Acts, 1823, pp. 444-450).

At this same session the Kentucky Assembly put forth a remonstrance to Congress on the subject of the decision of the Supreme Court of the United States on the occupying claimant laws of Kentucky (*Id.*, p. 520)—yet in the following year the Legislature expressly approved a report of one of its committees in which the decision of the Supreme Court of the United States, in Green *v.* Biddle, is cited in support of the argument against certain then recent decisions of the Court of Appeals of Kentucky, and the Legislature through its committee, in replying to a "response of the Judges," says:

> "So that it would seem that the compact with Virginia was incorporated into the constitution of the State of Kentucky, and made by the convention, a substantive part of that instrument, to no purpose. It was idly believed by the people, to be as sacredly binding as their constitution itself. Their belief in its obligatory effect was strengthened by the decision of these same Judges, pronounced in the case of Hoy's heirs *vs.* McMurray, &c., affirming the obligatory effect of that compact. That opinion will be found in 1st volume Littell's Reports, page 364. That opinion is quoted by the Supreme Court of the United States, in their decision of the case of Green and Biddle; in which decision by the Supreme Court the obligatory effect of the compact is affirmed, and the occupying claimant laws of Kentucky vacated by the obligatory force allowed to it by that Court. But the compact itself, the constitution of the State and their own previous decisions, and that of the Supreme Court of the United States, must all now yield to the force and obligation of the new theory. But what is worse, the reputation of the State must be inverted; the State must be proclaimed to be faithless and perfidious. Let the hundreds who have been ruined, and the thousands who have been greatly injured, by its

obligatory force, and who were not even tempted by their sufferings to tarnish their honor, by the assertion that it was not and ought not to be considered as obligatory upon the people of both States, say whether they are willing to subscribe to this new doctrine. The people of Kentucky are too magnanimous and high-minded to agree to be absolved from the obligation of that compact, by the operation of the new doctrine, or by any other means than the consent of the two States. They never contended for more than for a fair and just construction of that compact; they can never agree to escape from its effects, by denying its obligation. *Si non honeste tamen decore*, is a sentiment which they think should form the ultimate barrier, among even the most degenerate people; they will never agree to approach, or even be driven to that limit. The Kentuckians cannot consent to their absolution from the obligation of the compact, so gratuitously and so unexpectedly offered to them by the Appellate Judges. They want only the rights of freemen; they will maintain them, and with them the just pride of State character—the former by every legitimate mode; and the latter, by acknowledging and observing with good faith, the obligations of the compact which gave birth to the State.

"It cannot but appear somewhat strange, that the Judges should have defied the production of a single decision of a superior tribunal, in contravention of their new theory, when it is considered that the Chief Justice had found it necessary, in the case of Blair and Williams, to overrule a decision of the Supreme Court of the United States, which negatived the construction of the constitution upon which that theory rests. Surely the decision in the case of Green and Biddle above alluded to, giving obligatory effect to the compact, is contrary to their decision vacating it; and surely that is tne decision of a superior tribunal. The decision quoted from South Carolina, is the decision of the supreme appellate tribunal of that State; and their own decision in the case of Hoy's Heirs *vs.* McMurray, &c., giving obligatory effect to the compact, they must acknowledge to be the decision of a superior tribunal. The previous decisions of themselves and their predecessors, acknowledging the obligation of the compact, were all of appellate character; and all these, and the decisions, it is believed, of the civilized world, contravene their new doctrine. . . .

"Your committee cannot conclude, without expressing their deep regret, that the Judges should have attempted, by the construction which they have given,

in their response, to the 3rd section of the 4th article of the constitution of the State, to pervert its obvious and recorded meaning, and thereby intrench their errors in their resulting irresponsibility; and beg leave to recommend for the adoption of the Legislature, the following resolution:

Resolved by the General Assembly of the Commonwealth of Kentucky. That the Legislature thereof do possess the power, under and by virtue of the import of the 3rd section of the 4th article of the Constitution of the State, to remove, by address to the Governor for that purpose, any Judge of the superior or inferior courts of this commonwealth, from office, two-thirds of of each house concurring therein, for any mere error of judicial opinion, which does not amount to misdemeanor in office, notwithstanding that error shall have been committed in the course of judicial decision, if it shall inflict upon the community such injury as in their belief shall amount to a reasonable cause for his removal from office, provided they observe, in doing so, the form of proceeding prescribed in such case by the constitution" (Approved, January 11, 1825).

Laws of Kentucky, 1824, pp. 275–6, and 278.

In 1823 it was held that the Kentucky Legislature, notwithstanding the Compact, had power to change the mode of conveying land (Jackson *v.* Winn, 14 Ky. (4 Litt.), 322, 326), and in 1824 that the Federal Courts had not exclusive jurisdiction of a suit between claimants of the same land under grants from Virginia and Kentucky respectively, and that cause could not be removed to a United States court (Shepherd *v.* Young, 17 Ky. (1 Mon.), 204); and in 1825 that Kentucky Acts extending time for making surveys under Virginia entries were not inconsistent with the Compact (Botts *v.* Chiles, 18 Ky. (2 Mon.), 36), which was reaffirmed years later in Boone *v.* Helm, 34 Ky. (4 Dana), 403, and 35 Ky. (5 Dana), 512. In the same year, 1825, the Court held that where a will had been admitted to probate in Virginia prior to the separation, thus securing a "private right" under the Compact, an administrator appointed by the Virginia Court after the separation was authorized to sue in Kentucky courts (Emerson *v.* Staton, 19 Ky. (3 Mon.), 118).

In this year, 1825, the decision of this Court in Green *vs.* Biddle, which had been criticized by the Legislature

(*supra*, p. 112), was openly defied by the Court of Appeals in Bodley *v.* Gaither, 19 Ky. (3 Mon), 57, 59, and was soon afterwards sought to be distinguished in Fisher *v.* Cockerill, 21 Ky. (5 Mon.), 133, and again defied in Beard *v.* Smith, 22 Ky. (6 Mon.), 517, in which last cited case, decided in 1827, the Court of Appeals stated bluntly that "this Court has refused to submit" to the decision in Green *vs.* Biddle, "because in its principles it carries with the Compact many laws relating to land titles and fixes them irrevocably on Kentucky which this Court has believed never to have been included in the Compact."

In 1831 the Court of Appeals sustained again the occupying claimant law of 1812, cited Fowler *v.* Halbert, 4 Bibb., 52, and said:

"In the case of Bodley *v.* Gaither, 3 Monroe, 58, this court assigned reasons why the opinion of the Supreme Court of the United States in the case of Green *v.* Biddel (8 Wheat., 1) should not possess a controlling influence and binding force upon our proceedings. In the case of Sanders heirs *vs.* Norton, 4 Monroe, 465, in speaking of the Act of 1812 relative to occupying claimants, the Court says: "The question may be considered at rest and no longer open to discussion until some tribunal capable of controlling this court shall by its mandate set it again at large. The same thing was reaffirmed in the case of McKinney *v.* Carroll (5 Monroe, 97)."

Clark *v.* Gale, 28 Ky. (J. J. Mar.), 313, at p. 315.

This opinion, in Clarke *vs.* Gale, was probably delivered before the decision of this Court in Hawkins *v.* Barney, made in the same year (*infra*, p. 129), or at least before news of it had reached the Court of Appeals. Kentucky, having formulated its own doctrine of nullification, objected to that of this Court, and especially to the application of that doctrine to Kentucky, by what was called by some Kentuckians "the erroneous, injurious and degrading doctrines of the Supreme Court of the United States" in Green *v.* Biddle (Haines, Confl. over Judicial Powers, p. 100, referring to Ames, State Documents on Federal Relations, pp. 17–23, for a full history of the "conflict" over Green *v.* Biddle).

"On the failure of Congress to grant the relief desired by the state authorities, the issue was again brought

before the legislature in 1825 by a message from the governor. The house of representatives (of Kentucky) sent an inquiry to the governor asking information regarding the proper procedure "to refuse obedience to the decisions and mandates of the Supreme Court of the United States, *considered erroneous and unconstitutional*, and whether in the opinion of the executive, it may be advisable to call forth the physical power of the State to resist the execution of the decisions of the Court or in what manner the mandate of said court should be met by disobedience" (Niles, XXIX, pp. 228, 229). As the governor was not inclined to assume the responsibility of the use of physical force, a feeble resistance was continued until 1831 when a second decision of the Supreme Court was accepted as final by the state authorities (Hawkins *v.* Barney's Lessees, 5 Pet., 457)" (Haines, op. cit., p. 101).

In 1833, two years after the decision of this Court in Hawkins *v.* Barney, the Compact and Green *v.* Biddle were once more before the Court of Appeals and the Kentucky Act of 1824, providing for forfeiture of lands for failure to clear a part of the tract, was held void, so far as it affected lands in Kentucky patented under surveys made by Virginia officials while the land was still within Virginia, and the Court says:

> "I know of no principle which will allow the government, any more than an individual, after fairly selling and conveying land to take back the land and resume the title, at its own pleasure against the will of the grantee. Neither am I acquainted with any principle which will allow the Government to annex *new conditions unknown at the time of the original contract;* and for a *violation of them seize the land, divest the citizen of his title and retain the consideration which the citizen paid* or rendered, without remunerating him therefor."
>
> Gaines *vs.* Buford, 31 Ky. (1 Dana), 481, 486.

In the course of an able opinion the Court says:

> "It must be the effect which the Act of 1824 will have in the Federal courts, in counteracting the principles settled in the case of Green, &c., *vs.* Biddle, which must identify it with the occupant acts, and give to it the same degree of constitutionality which they possess. Whether it will have any effect in the Federal courts be-

longs to them to determine. But let it operate as it may in these courts, I think it can be clearly shown that its operation there cannot reconcile it with the Constitution. The decision of the Supreme Court, in Green *vs.* Biddle, is either right or wrong. If right, then the Act of 1824 was conceived for the purpose of thwarting what is right; but, if wrong, then the act was designed to overturn error or to guard against its consequences." . . . (pp. 495–6).

"If the decision of the Supreme Court be right, the Act of 1824 is a palpable attempt *to coerce the better claimant to purchase justice, and it prescribes the price at which the Federal courts are to sell it.* I have heard it said, that the clause of the Constitution which prohibits the sale of justice, was merely intended to operate upon the judiciary and to restrain corrupt practices of judges. I give it no such limited construction, but extend it to all the departments of government, and would enforce it, as one of those great fundamental principles essential to the welfare of society" (p. 497). . . . *The Legislature has no power to revise, annul or counteract a decision of this Court, much less one of the Supreme Court.* . . . . The legislative department transcends its power whenever it undertakes to thwart or counteract the judgment or decree of a court of competent jurisdiction. It cannot do this directly without trampling upon the constitutional functions of the judiciary. It cannot do indirectly that which could not be done by direct action. A careful examination of the Act of 1824 has satisfied my mind that all its provisions for forfeiting lands were intended to thwart and counteract the decision of the Supreme Court, and are so far, an unconstitutional interference with the legitimate operations of 'another department.'

"I have endeavored to show, that the Legislature cannot constitutionally forfeit land because the owner will not clear it, or build houses of brick or stone, or ornament it with gardens, &c., &c. If I am right in that position *I cannot perceive how it is possible to make the forfeiture constitutional by regarding it as the means to accomplish a desirable end.* I do not subscribe to the doctrine, that the end will justify the means, either in law or morals" . . . (pp. 498–9).

"I shall notice one idea more in defence of the act, and only one. It is the appeal made in the preamble to the sovereign power of the State. I do not admit that there is any sovereign power, in the literal meaning of the terms, to be found anywhere in our systems of government" . . . (p. 500).

"'Sovereign state' are cabalistic words, not understood by the disciple of liberty, who has been instructed in our constitutional schools. It is an appropriate phrase when applied to an absolute despotism. I firmly believe, that the idea of sovereign power in the government of a republic is incompatible with the existence and permanent foundation of civil liberty and the rights of property." . . .

"To escape the objection that the act is *a violation of the contract growing out of the patent from Virginia*, it is indispensable that the act should be treated as enjoining a duty on land proprietors, and then, for the failure to perform that duty, prescribing the penalty of forfeiture as a mode of enforcing obedience to the legislative command. It is, therefore, a highly penal law; and if the power of the Legislature to prescribe such a penalty for such an offense be conceded, it is still very material to enquire whether the manner in which it is attempted to be enforced is allowed by the Federal and State Constitutions. This Court has been compelled, on several occasions, to deny the validity of legislative enactments, because of their being attempts to exercise admitted powers in an unconstitutional manner."

Gaines *vs.* Buford, 31 Ky. (1 Dana), 504–5.

In 1839 the Court referred to the Compact as "a fundamental agreement" (Rollins *v.* Clark, 38 Ky. (8 Dana), at p. 19).

In 1841 an Act of 1820 (2 Moreh. & Br. Stats., 1043) as to lands below the Tennessee River, prospective only, which directed that the entry should be returned to the Register with the survey, to enable him to see that they correspond, and forbade him to issue a grant for any land not contained in the entry, was sustained on the ground that the "private rights and interests of lands" were bounded by the entries made on or before May 1, 1792, and could not be extended beyond it.

The Court said, "The private right of Barker's heirs which is protected by the seventh section of the Compact, and the only private right which they hold, derived from the laws of Virginia prior to the separation, was their entry. To the full extent of the land covered by their entry and no further, they have a right to demand protection, and that their claim shall be tested and determined *by the laws then in force in Virginia.*" (1841, Ray *v.* Barker, 40 Ky. (1. B. Mon.), 364, 367.

Again the Court, in sustaining a Virginia patent issued in 1787, states the rule, as follows:

"As this was a Virginia patent, issued before the separation of Kentucky from her, the rights of the patentee vested under the laws of Virginia and are protected by the compact between her and her daughter Kentucky; and to deprive him or his vendees of any rights acquired by her patent or to circumscribe the boundaries within narrower compass than did her laws is a violation in spirit and letter of said compact, which is now made of constitutional sanction and sacredness and which expressly provides (Sec. 7) that all private rights and interests of lands derived from the laws of Virginia prior to such separation shall remain valid and secure and be determined by the Virginia laws."

1867. Berry *vs.* Snyder, 66 Ky. (3 Bush), 266, at p. 279.

Still later the Court said:

"In the case of Green *v.* Biddle, 8 Wheaton, 1, involving the constitutional validity of the occupying claimants' law of Kentucky, the Supreme Court said, as to this view of the question: 'It is no answer that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they overturned his rights and interests.' . . . "The ability to comply with the obligation to perform, or render redress for not performing, the contract, cannot be lessened, weakened, impaired, or taken away by the Legislature by the force of a law purporting to regulate the remedy (Blair *v.* Williams: Lapsley *v.* Brashears, 4 Littell, 651; Planter's Bank *v.* Sharp *et al.*, 6 How., 301; Bronson *v.* Kinzie, 1 How., 311). . . . The current of authority establishes, without serious conflict, as we conceive . . . that the laws in force, when and where the contract may be made, form a part of it (Von Hoffman *v.* City of Quincy, 4 Wall., 535)."

Collins *v.* Collins, 79 Ky., pp. 90–92.

So, too, the Court has held, Ky. Stat., § 2377 (requiring payment of taxes for 20 years preceding the bringing of an action of ejectment on Patents issued prior to the year 1820) to be unconstitutional and void.

1901. Shaw *vs.* Robinson, 64 S. W., 620; 111 Ky., 715; 23 Ky. L. R., 998.

A Kentucky jurist concludes his summary review of the acts and decisions of Kentucky in relation to the Compact, as follows:

"An act was passed in 1824 with a view to defeat outstanding titles, by requiring all owners of large tracts to improve so many acres per hundred within short-named time and confiscating their land by way of penalty for the benefit of the occupant. This reckless and clumsy statute was declared void as a plain breach of the Compact with Virginia (Buford *v.* Gaines, 1 Dana, 479–517). The laws forfeiting lands for failure to list them have always been disregarded as unconstitutional, but have been re-enacted in all revisions."

Dembitz, Kentucky Jurisprudence, p. 162, 163,

and in another place the same writer says:

"The Constitution of 1891, unlike the preceding ones, does not embody the Compact with Virginia as part of itself but rather seeks to evade its force" (*Id.*, p. 116).

From all of which it seems that while the Commonwealth of Kentucky has appealed to this Court, and not in vain, to enforce the rights which were secured to it by the Compact, some of its officials have not been so eager to comply with its obligations as declared by this Court.

(3) In the Supreme Court of the United States.

Of the many Compacts between States that have come before this Court, this Virginia-Kentucky Compact was one of the earliest and that which this Court has been most often called upon to construe.

In 1801 the Compact was invoked in attempting to prevent this Court from taking jurisdiction of a suit relating to Kentucky lands. This Court, speaking by Mr. Chief Justice Marshall, said:

"This is a writ of error to a judgment of the Court of the United States for the district of Kentucky, rendered on a caveat, *and is governed by the land laws of Virginia* . . . The Compact must be considered as providing for the *preservation of titles*, not of the tribunals which should decide on those titles."

Wilson *v.* Mason, 1 Cranch, 45, 87, 91.

In 1818, five years before the decision in Green *v.* Biddle, this Court, in construing the Compact of 1802 between Virginia and Tennessee, and the laws in pursuance

thereof, which "declared that all claims and titles to lands derived from the governments of Virginia or North Carolina or Tennessee, which have fallen into the respective States, shall remain as valid and secure to the owners thereof as if derived from the government within whose line they have fallen, and shall not be in any wise prejudiced or affected in consequence of the establishment of said line" (3 Wheat., 218), held that where titles to lands in Tennessee were derived under grant from Virginia, the doctrine of the Tennessee courts as to the priority of a junior patent on a prior entry "could not apply to . . . titles deriving all their validity from the laws of Virginia and confirmed by the compact between the two States."

Robinson *v.* Campbell, 3 Wheat., 212, 218, 222.

Mr. Justice Todd, who wrote the Opinion of this Court in that case, had been Chief Justice of the Court of Appeals of Kentucky, and "laid the foundation of the land laws of his State (Kentucky), and his perfect familiarity with questions of this character gave him a controlling influence with his brethren of the Supreme Court of the United States when considering claims" relating to such matters (Carson, The Supreme Court of the United States, Vol. I, p. 232). He was one of the Justices who concurred in the decision in Green *v.* Biddle, and was merely declaring in this earlier case the doctrine that he later joined in declaring in Green *v.* Biddle. The resolutions of one of the Kentucky conventions looking towards the admission of Kentucky under the proposed Compact are in his handwriting (*infra*, p. 127).

1823—*Green* v. *Biddle* (8 Wheat., 1), in ejectment in the Federal Circuit Court for Kentucky, by heirs of John Green *v.* Richard Biddle, certified to this Court on division of opinion in the Court below.

All statements (of those who do not like it) to the contrary notwithstanding, this was a very well considered case and is still the true "law of the land." It has never been criticised by this Court and has been many times

since cited as authority both by this Court and by the Courts of many of the States, and was afterwards expressly reaffirmed by this Court in a case involving the same question where a similar statute of New York was declared void (Carver *v.* Jackson, *infra*, p. 128).

This Court, too, speaking through its then Chief Justice, has taken pains to answer the critics most explicitly by referring to the judgment in Green *vs.* Biddle as "entitled to all the more weight because the decision is stated in the report of the case to have been unanimous and Judge Washington, who was the only member of the Court absent on the first argument, delivered the opinion of the second" (Bronson *v.* Kinzie, 1 How., 316, at p. 317).

The question actually decided in Green *v.* Biddle is not raised in the cases now at bar, for plaintiff in error, through its officers, has publicly stated that it has no intention to try to deprive any settler of his home, and the lands whose title is sought to be forfeited in the cases at bar are mainly the "unenclosed forests" (*infra*, p. 292), and not the lands actually long occupied by settlers by enclosure or cultivation But Green *v.* Biddle is relied upon by plaintiff in error as a well established authority for the contentions (1) that since the Compact prevents burdening the true owner with the costs of improvements by an adverse occupant, *a fortiori* it prevents the forfeiture of the true owner's whole title in favor of adverse occupants, and (2) that the "rights and interests" of plaintiff in error are to be held "valid and secure" according to the laws of Virginia as they existed on December 18, 1789 (*infra*, p. 147).

The case was first argued at February Term, 1821, by counsel for defendants, no counsel appearing for the tenant (8 Wheat., 7), Present, Mr. Chief Justice Marshall, and Messrs. Justices Johnson, Livingstone, Todd, Duvall and Story, and the Opinion of the Court delivered by Mr. Justice Story declares that "*It is the unanimous opinion* of the Court that the Acts of 1797 and 1812 are a violation of the seventh article of the Compact with Virginia and therefore unconstitutional" (*Id.*, p. 17).

A rehearing was afterwards had in February term,

1823, on motion of "the great Commoner" Henry Clay, "upon the ground that it involved the rights and claims of numerous occupants of lands in Kentucky, who had been allowed by the laws of that State, in consequence of the confusion of the land titles arising out of the vicious system of location under the land law of Virginia, as indemnity for their expenses and labor bestowed upon the lands of which they had been the *bona fide* possessors and improvers and which were reclaimed by the true owners," and that "the rights and interests of those claimants would be irrevocably determined by this decision of the Court" (*Id.*, p. 18). On the reargument, the case of the occupants was presented by some of the ablest counsel then at the bar, including Hon. Henry Clay, who had been Speaker of the House of Representatives a dozen years earlier, and a few years later became Senator of the United States from Kentucky, and Hon. George M. Bibb, who had been Chief Justice of the Court of Appeals of Kentucky, and Senator of the United States from Kentucky (2 Collins Hist. Ky., 277). These counsel seem to have exhausted all possible arguments to prevent the Court from declaring these acts of the Kentucky Legislature to be unconstitutional. All these arguments were carefully considered by the Court. Some of them had been already disposed of by the unanimous Opinion of the Court delivered by Mr. Justice Story and all were overruled by the second Opinion of the Court delivered by Mr. Justice Washington, with no dissenting opinion except that of Mr. Justice Johnson, who had also dissented from the Opinion of this Court in Fletcher *v.* Peck (Carson, Supreme Court of the United States, Vol. 1, p. 228).

In its first opinion the Court, by Mr. Justice Story, said:

"The first question certified from the Circuit Court of Kentucky in this cause is whether the Acts of Ky. of the 27th of Feb'y, 1797, and of 31 of Jan'y, 1812, concerning occupying claimants of land are unconstitutional? This question depends principally upon the construction of the 7th Article of the Compact between Virginia and Kentucky upon the separation of the latter from the former State—that compact being made part of the Constitution of Kentucky. The 7th Article de-

clares that all private rights and interests of lands, within the said district derived from the laws of Virginia shall remain valid and secure under the laws of the proposed State and shall be determined by the laws now existing in this State."

The Court calls attention to the fact that "no acts of a similar character were in existence in Virginia *at the time when* the compact was made, and therefore no aid can be derived from the actual legislation of Virginia to support them" (8 Wheat, 1, p. 13); and farther on in the opinion, it is said that

"It is no answer that the acts of Kentucky now in question are regulations of the remedy and not of the right to the lands. If those acts *so change the nature and extent of existing remedies as materially to impair the rights and interests* of the owner they are as much a violation of the Compact as if they directly overturned their rights and interests," and the opinion concludes:

"It is the *unanimous opinion* of the Court that the Act of 1797 and 1812 are a violation of the 7th Article of the Compact with Virginia and therefore are unconstitutional" (*Id.*, p. 17).

On the reargument it was urged that the decisions of the Kentucky Courts sustaining these statutes should be followed (*Id.*, p. 35). "How can this Court interfere after the settled decisions of the local courts has confirmed the validity of these laws and thus disturb the rules of property which have been firmly established, and that parties on both sides, really interested in the controversy are citizens of the same State?" asks counsel for defendant (*Id.*, p. 36), who also contended that

"The only remaining question is whether this Court can declare a State statute void as being repugnant to the Constitution of the State, contrary to the uniform decisions of the State Courts who are the rightful exclusive expounders of their own local law . . . If citizens of Kentucky alone are interested they ought to be bound by the decisions of their own courts, and if the rights of citizens of Virginia are involved it depends upon the pleasure of that state to create the tribunal by which they are to be determined" (*Id.*, p. 38); and again Counsel urged (*Id.*, p. 46) that "the State Court of last resort has affirmed the consistency of the law (Statute) with the compact and consequently with the Constitution" (citing 4 Bibb. 52) and also argued that the Compact was void because not

approved by Act of Congress; and that it was impossible for a State to limit its sovereignty, etc.; also that the Compact provided for a Commission to determine disputes, and that the rule that provision for arbitrators as in policies of insurance did not deprive Courts of jurisdiction, did not apply because this rule was made by the Courts of Westminster Hall on ground of "their transcendent authority," but that the Courts of the United States have limited jurisdiction and cognizances of only few classes of cases"; and then after referring to the Virginia Act of 1748 (Leigh's Rev. Va. laws, 333) as giving right to individuals to acquire part of public domain by survey with certain specified improvements, defendant's counsel says:

"In 1779 commenced the calamitous system under which Kentucky now suffers. 'In order to raise a revenue and provide for the defence of the frontier the previous survey was dispensed with and hence the conflicting claims which now cover the whole surface of the country. At the period of the separation of the two States the titles acquired under the law of 1779 were incomplete, and in every stage of progression from entry to patent'" (p. 49) and that

"This court has solemnly sanctioned the Act of Kentucky giving further time for surveys as well as the Statute of Limitations of that State and the act concerning Champerty and maintenance, 2 Wheat 325; I Wheat 292;" and also cited on the point that this Court will follow State Courts as to land titles, 5 Cranch 223; and also contended on the rehearing that the object of the Compact was merely to 'bind the new State as far as Virginia was bound, but to leave it as free as she would have been had there been no separation.'" (8 Wheat. 50.)

So too counsel for adverse occupants in answer to the objection (by himself suggested) that his contention would result "in a nominal compliance with the Compact but a real violation of it (8 Wheat, 53) answers "If the laws (of Kentucky) operated on the title, if they obstructed or defeated it, the argument (against his contention) would indeed have weight. It would, however, at the same time be equally applicable to a case of forfeiture for non-cultivation; for in that case, too, it might be said that you admit the title and forfeit the land." But defendant's counsel failed to notice that the case of forfeiture for non-cultivation is expressly provided for by the

8th section of the Compact which under the maxim "expressio unius exclusio alterius" excludes forfeiture for any other cause (*infra*, p. 159).

Counsel for plaintiff argued that "The nature of the social state and of civil government itself prescribes some limits to the legislative power independent of the express provisions of the written Constitution" (citing Fletcher *v.* Peck, 6 Cranch, 135).

The Opinion of this Court on the rehearing opens with the question, and the decision is founded on the Court's answer to the question, whether the laws of Kentucky then in question left the rights and interests under Virginia grants as valid and secure "*as they were under the laws of Virginia on the 18th day of December 1789*" (8 Wheat., p. 69).

This Court said "a law which denies to the owner of land a remedy to recover possession of it, when withheld by any person, however innocently he may have obtained it, or to recover profits received from it by the occupant, or which clogs his recovery of such profits by conditions tending *to diminish the value and amount of the thing recovered*, impairs his *right to and interest* in the property" (*Id.*, p. 75).

In discussing whether the Compact was invalid because without the consent of Congress, the Court says:

> "On the 28th of July, 1790, the Convention of that District assembled . . . and declared its consent" (*Id.*, p. 86). In answer to the objection that the Supreme Court had no jurisdiction to declare the Statute invalid on the ground that it was contrary to the Kentucky Constitution the Court says: "It will be a sufficient answer to this observation that our opinion is founded exclusively upon the Constitution of the United States" (p. 90); and in answer to another contention the Court held that the provision in the Compact for appointment of Commissioners applies only "where a complaint or dispute shall arise not between individuals but between the Commonwealth of Virginia and the State of Kentucky in their high sovereign characters" (8 Wheat., p. 91); and answering another argument the Court said that "not having had an opportunity of examining the reported cases of the Kentucky Courts we do not feel ourselves at liberty to admit or deny" the assertion of counsel that the validity of these Statutes

"had been maintained by an invarying series of decisions of the Courts of that State," but the Court adds, "the principles decided by the Court of Appeals of that State in the case of Hayes' heirs *v.* McMurray, a Mss. report of which was handed to the Court when the case was argued, are in strict conformity with this opinion . . . the objections of the Governor to the latter act of (1812) and the reasons assigned by him in their support, taken in connection with the above case, incline us strongly to suspect that a great diversity of opinions prevails in that State upon the question we have been examining. *However this may be we hold ourselves answerable to God, our conscience and our country to decide this question according to the dictates of our best judgment, be the consequences of the decision what they may.* If we have ventured to entertain a wish as to the result of the investigation which we have laboriously given to the case, it was that it might be favorable to the validity of the laws, our feelings being always on that side of the question, unless the objections to them are fairly and clearly made out. *The above is the opinion of the majority of the Court.*" (*Id.*, p. 92).

If any men more than all others might be supposed to know what was intended by the Compact they were those who decided Green *v.* Biddle.

The "Great Chief Justice" Marshall, in 1786, had acted as agent of the Kentuckians to present to the Virginia Assembly a request for a modification of the conditions of the first enabling act, which request was granted (McElroy, Kentucky in the Nation's Hist., p. 131), and the resolutions of the Kentucky Convention of 1788, recommending the election of delegates to a convention to take measures for the admission of Kentucky into the Union, are in the handwriting of the Honorable Thomas Todd (Op. cit., p. 138, note), who was afterwards a Justice of this Court, and wrote the opinion in Robinson *v.* Campbell (*supra*, p. 121), and concurred in this decision of Green *v.* Biddle.

1826–Miller *v.* McIntire }
1832–Miller *v.* McIntyre } This case, involving this same Compact, was three times before the Supreme Court (First as Shipp *v.* Miller, 2 Wheat., 316), then as above (11 *Id.*, 441; 6 Pet., 61). It was begun in May, 1808, on an entry of 1782, survey 1804, and Patent 1820, for 1,687

acres on Licking against occupants under a conflicting elder patent based on a junior entry (11 Wheat., 442; 6 Pet., 62). On the first hearing the plaintiff's entry was sustained but the question under the Compact was not raised (Shipp *v.* Miller, 2 Wheat., 316). On the second hearing the Justices were divided on the question whether the Compact prevented Kentucky from prolonging the time for surveying one entry to the prejudice of another (11 Wheat., 443), but the cause was remanded, and, when it again came up for third hearing, held that the defendants were protected by more than 20 years adverse possession under the elder patent (6 Pet., 62).

Some years later an Occupying claimant's law of the State of New York, enacted in 1786, similar to the Kentucky law annulled in Green *v.* Biddle, came before this Court. It was declared void.

Mr. Justice Story, delivering the opinion, said:

> "The argument at the bar supposes that there is a natural equity to receive payment for all improvements made upon land. In certain cases there may be an equitable claim; but that in all cases a party is bound by natural justice to pay for improvements made against his will, or without his consent, is a proposition which we are not prepared to admit. We adhere to the doctrine laid down on this subject in Green *v.* Biddle (8 Wheat, 1).
>
> "We are of the opinion that the claim for improvements in this case is inconsistent with the Treaty of Peace, and ought to be rejected."
>
> Carver *v.* Jackson, 4 Peters, 1, 101.

From which it appears that Green *v.* Biddle and Carver *v.* Jackson were very similar in their facts and identical in the principle of law declared by the Supreme Court. The difference was in the consequences. New York respected and complied with the decision.

The next following year, again on the question of the Occupying claimant law of Kentucky, Mr. Chief Justice Marshall, delivering the opinion of the Court, says:

> "The seventh article of the compact between Virginia and Kentucky is in these words: 'That all private rights and interests of lands within the said district, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of

the proposed state and shall be determined by the laws now existing in this State.'

"This is the article the violation of which is alleged by the plaintiff in error. To bring his case within its protection, he must show that the title he asserts is derived from the laws of Virginia prior to the separation of the two States. If the title be not so derived, the compact does not extend to it; and the plaintiff alleges no other error."

And, after stating that the record did not show such derivation, the Chief Justice concludes:

"In the argument we have been admonished of the jealousy with which the states of the Union view the revising power intrusted by the Constitution and laws of the United States to this tribunal. To observations of this character the answer uniformly given has been that the course of the judicial department is marked out by law. We must tread the direct and narrow path prescribed for us. As this court has never grasped at ungranted jurisdiction, so will it never, we trust, shrink from the exercise of that which is conferred upon it."

Fisher *v.* Cockerell, 5 Peters, 248, 253, 259.

From which it appears that the Kentuckians were not satisfied with merely disregarding the decision in Green *v.* Biddle.

1831—*Hawkins* v. *Barney* (5 Pet., 457), from Federal Circuit Court for Kentucky, in ejectment, the question being whether a seven year Statute of Limitation, enacted by Kentucky, was valid. Judgment below for defendant. Mr. Justice Johnson, delivering the opinion of this Court, said:

"It is now argued that by the seventh article of the compact with Virginia, Kentucky was precluded from passing such a law. And that this court has, in fact, established this principle, in their decision against the validity of the occupying claimant laws."

"I am instructed by the Court to say that *such is not their idea of the bearing of that decision.*"

"On a subject so often and so ably discussed in this court and elsewhere, and on which the public mind has so long pondered, it would be an useless waste of time to amplify. A very few remarks only will be bestowed upon it" (5 Pet., 464).

The opinion then shows the distinctions between this case and that of Green *v.* Biddle. After referring to the condition of the "private rights and interests" at the time of separation from Virginia, the learned Justice says:

> "When about then to surrender the care and preservation of rights and interests, so novel and so complex, into other hands, it was not unreasonably supposed by many that the provisions of the compact of separation were intended to embrace something beyond the general assertion of the principles of international law, in behalf of the persons whose rights were implicated in, or jeoparded by the transfer."
>
> "Such appears to have been the view in which the majority of this court regarded the subject in the case of Green *v.* Biddle, when upon examining the practical operation of the occupying claimant laws of Kentucky upon the rights of landholders, they were thought to be like a disease planted in the vitals of men's estate, and a disease against which no human prudence could have guarded them, or at least no practical prudence, considering the state of the country, and the nature of their interests. And when again upon looking through the course of legislation in Virginia, there were found no principle or precedent to support such laws, the Court was induced to pass upon them as laws *calculated in effect to annihilate the rights secured by the compact*, while they avoided an avowed collision with its literal meaning. But in all their reasoning on the subject, they will be found to acknowledge that whatever course of legislation could be sanctioned by the principles and practice of Virginia, would be regarded as an unaffected compliance with the compact" (*Id.*, *Ib.*).

Some of those who wish practically to nullify the Compact have insinuated, although they have not been bold enough positively to declare, that the dictum in the last sentence above quoted means that any principles and practice sanctioned by Virginia before *or after* the Compact would be an unaffected compliance with the Compact.

But this suggestion, it is submitted, is unjust to Mr. Justice Johnson, since it would be contrary to the express words of the Compact which declares that the laws "now" existing shall determine the rights and interests, and the suggested meaning would render the provisions of the Compact a dead letter and a mockery, as Virginia after December 18, 1789, had the power to do anything and

everything with respects to lands still remaining in Virginia that the Legislature or the people of Virginia might elect to do, unrestricted by the Compact, which was just what the Legislature of Virginia intended to prevent the Legislature and people of Kentucky from doing in regard to rights and interests to lands which, after the separation, were to be in Kentucky, in so far as anything so done would render such rights and interests "less valid and secure" than they were according to the laws of Virginia, not as they should exist at any time thereafter, but as "now" (December 18, 1789) existing in Virginia. In other words, it is attempted by misapplying the language of Mr. Justice Johnson to make him in effect overrule the decision in Green *v.* Biddle, which was rendered after two hearings and most elaborate arguments in which counsel for the occupants had urged this same argument (*supra*, p. 125), as indeed all the other arguments that are urged to-day to nullify in effect and "explain away" the Compact, while permitting the bare shell and shadow to remain.

Such a construction would also approach what Mr. Justice Johnson, somewhat further on in the same opinion, states could not have been intended, *i. e.*, to reduce Kentucky to a state of vassalage . . . dependent on Virginia" (5 Pet., 467), by making the legislative power of Kentucky depend in part upon what the Legislature of Virginia might do after the date of the Compact. The learned Justice says:

"Let the language of the compact be literally applied, and we have the anomaly presented of a sovereign State, governed by the laws of another sovereign—of one-half the territory of a sovereign State hopelessly and forever subjected to the laws of another State. Or a motley multiform administration of laws, under which A would be subject to one class of laws, because holding under a Virginia grant, while B, his next door neighbor, claiming from Kentucky, would hardly be conscious of living under the same government."

"If the seventh article of the compact can be construed so as to make the Limitation Act of Virginia perpetual and unrepealable in Kentucky, then I know not on what principle the same rule can be precluded from applying to the laws of descent, conveyance,

devise, dower, courtesy, and, in fact, every law applicable to real estate" (5 Pet., 467).

Here again, Hawkins *v.* Barney is distinguished from Green *vs.* Biddle, for in Green *vs.* Biddle it had been conceded by Counsel for the true owner that the Compact did not prevent Kentucky from changing the Statute of Limitations nor from taxing the lands, and selling the same to enforce payment, changing the laws of descents, modifying the remedies, etc., "according to the fluctuating wants of Society *provided they do not have an unjust retrospective operation upon vested rights.* All these changes in the civil legislation of the State may be made and the titles to land, as acquired under the laws of Virginia, will still remain unimpaired" (8 Wheat, at pp. 64, 65). In other words the Compact does not prevent changes in the laws determining the devolution of the "private rights and interests" derived under the Virginia patents, by general laws of inheritance or by deed from those in privity with the patentees, but does prevent a destruction or impairment of those rights and interests in favor of those claiming *adversely thereto, i. e.* changes that will render such rights and interests less "valid and secure."

Again Mr. Justice Johnson says:

"It is argued that limitation laws, although belonging to the lex fori and applying immediately to the remedy, yet indirectly they effect a complete devesture and even transfer of right.

"This is unquestionably true, and yet in nowise fatal to the validity of this law. The right to appropriate a derelict is one of universal law, well known to the civil law, the common law, and to all law; it existed in a state of nature, and is only modified by Society, according to the discretion of each community.

"What is the evidence of an individual having abandoned his rights or property? It is clear that that the subject is one over which every community is at liberty to make a rule for itself; and if the State of Kentucky has established the rule of seven years' negligence to pursue a remedy, there can be but one question made upon the right to do so, which is: whether after abstaining from the exercise of this right for twenty years, it is possible now to impute to her the want of good faith in the execution of this compact."

"Virginia has always exercised an analogous right, not only in the form of an act of limitation, but in requiring actual seating and cultivation."

"In the early settlement of the country, the man who received a grant of land and failed, at first in three, and afterwards in five years, to seat and improve it, was held to have abandoned it; it received the denomination of lapsed land, was declared to be forfeited (Mercer's Abr.), and anyone might take out a grant for it. The last member of the eighth article of this compact distinctly recognizes the existence of the power in Kentucky to pass similar laws, notwithstanding the restrictions of the seventh article, and also the probability of her resorting to the policy of such laws. It restricts her from passing them for six years; and what is remarkable, the protection of this restriction is expressly confined to the citizens of the two States; leaving the plaintiff below, and all others not citizens of Virginia, to an uncontrolled exercise of such a power. Forfeiture is the word used in the old laws, and forfeiture is that used in the compact, and the term is correctly applied, since it supposes a revesting in the Commonwealth; and it is remarkable how scrupulously Kentucky has adhered to the Virginian principle in her seven years' law since the benefit of it is confined to such only as claim under a grant from the Commonwealth, thus literally applying the Virginian principle of a revesting in the Commonwealth and regranting to the individual." (*Id.*, p. 465).

These laws for forfeiture for failure to improve, were, as existing at the time of the Compact, conditions *precedent* incorporated in the grant, either actually upon the face of the grant itself or virtually by the terms of the Statute existing at the time of the grant, and hence forming in law a part of it. One of the anomalies of the acts of forfeiture enacted since the Compact is that they ignore the ages-long distinction of the common law between conditions precedent and conditions subsequent.

So, too, unless a preceding Statute has declared designated acts or omissions to constitute forfeiture of title as if abandoned, the owner cannot thus be deprived of his title. Whatever the rule may be under the civil law as to all property, or under the common law as to personal property or easements in land, a vested legal title to land cannot be lost by alleged abandonment (I Cyc., 6; Tarver

v. Depper, 65 S. E., 177, 179; Carolina Bent. R. C. *v.* McCaskill, 94 N. C., 746; Bear Valley Coal Co. *v.* Dewart, 95 Pa. St., 72; Putnam *v.* Tyler, 117, *Id.*, 570).

There is no evidence of a lack of actual entry on these lands, but such entry was unnecessary. The earliest patent from Virginia to lands in Kentucky gives seizin and constructive possession without prior actual entry (Green *v.* Liter, 8 Cranch, 229); also reported in 6 Ky. (3 Bibb), at p. 64, note; Society for Propagation, etc. *v.* Town of Pawlet, 4 Pet., 480; United States *v.* Arredendo, 6 Pet., 743; Mitchell *v.* United States, 9 Pet., 735; Strother *v.* Lucas, 12 Pet., 456; Green *v.* Pennington, 105 Va., 801; 54 S. E., 877; Clay *v.* White, 1 Munf. (Va)., 162; Dawson *v.* Watkins, 2 Rob. (Va.), 259, 268; Carter *v.* Hagen, 75 Va., 557; Howdashell *v.* Krenning, 103 Va., 30; 48 S. E., 491; Overton *v.* Davison, 1 Grat., 211; Halloran *v.* Meisel, 87 Va., 401; 13 S. E., 33; Smith *v.* Frost, 32 Ky. (2 Dana), 144, 148–151; Taylor *v.* Shield, 15 Ky. (5 Litt.), 296). "*There can be but one right of entry and the whole of that passes by the patent of the Commonwealth to the first patentee; consequently, no right of entry can pass to a subsequent patentee because at the date of such patent no such right was in the Commonwealth*" (Botts *v.* Shields, 13 Ky. (3 Litt.), 32; S. P. Jones *v.* McCauley, 63 Ky. (2 Duv.), 14).

In Hornsby *v.* United States this Court, by Mr. Justice Field, in ruling that "mere neglect to comply with the conditions to obtain judicial possession did not of itself work a forfeiture of the grantee's right under the Mexican laws," said:

> "The interest of the grantee could not be divested under the Mexican law any more than at the common law by mere allegations and surmises." 10 Wall., 224.

In Gonzales *v.* Ross, this Court, by Mr. Justice Bradley, said:

> "It cannot be assumed . . . that the taxes on the land have not been paid" "or that the grantee and those claming under him did not continue in possession of the land . . . By the rules of law possession will be presumed to accompany ownership until the contrary is proved; and constructive possession consequent upon

legal ownership is sufficient as against mere trespassers, that is as against those who do not show some right of possession" (120 U. S., 630, 648).

Moreover, failure to list lands for taxation or to cultivate land is not evidence of surrender of possession (Smith *v.* Morrow, 23 Ky. (7 Mon.), 234, 239, 240; Kercheval *v.* Ambler, 34 Ky. (4 Dana), 166, 25 Am. & Eng. Enc. L., p. 129). *A fortiori* it is not evidence of relinquishment of title. The Statutes of Kentucky or Virginia other than Statutes of limitation have never provided but one way of relinquishing title, and that is by a voluntary deed of "Relinquishment" in the form prescribed by statute (Clarke *v.* Courtney, 5 Pet., 319, 345, 351).

But when Mr. Justice Johnson says that the Compact, "notwithstanding" the restrictions of the seventh clause permits forfeiture for failure to improve, he seems to have been unaware that the laws of Virginia at the date of the Compact permitted forfeiture for that cause; so that the 8th section instead of being a relaxing in one special case of the restrictions of the 7th is in fact a further restriction for the period of six years from doing what Virginia might have sooner done under the laws existing at the date of the Compact (*infra*, p. 159).

Hawkins *v.* Barney neither conflicts with nor in any way limits the scope of the decision in Green *v.* Biddle, but merely holds, what was conceded even by the plaintiff in Green *v.* Biddle (*supra*), that the Compact did not prevent Kentucky from shortening the period of the Statute of Limitations if a reasonable time were still given to the true owner to begin his action. Such a shortening of the Statute does not render the owner's "rights and interests" less "valid and secure" than they were under the Virginia laws on the 18th day of December, 1789, but merely requires that he should be more prompt in enforcing such rights and interests. So, too, laws of Kentucky changing the provisions of the Statute of descents and other laws that affect merely the devolution of property or testamentary disposition, the laws of contract, of judicial proceedings, of taxation, where the same are not confiscatory nor de-

nials of equal protection to all citizens or owners of property, would not be against the Compact. In short, as stated by the Supreme Court in Hawkins *vs.* Barney, the Compact was not intended to make Kentucky "a vassal of Virginia." But there is not a word in the opinion in Hawkins *v.* Barney that either expressly or by implication limits the scope of the prior opinion in Green *v.* Biddle.

The *dicta* which seem to be based on a misapprehension of the 8th Section of the Compact are hereinafter considered (p. 158, *infra*). Passing to the *rationes decidendi*, the distinction between the two cases is too wide and deep to need argument. Hawkins *v.* Barney holds that the shortening of a statute of limitations to seven years does not violate the Compact. The same thing has always been held and in many other cases, viz.: that a reasonable shortening of a statute of limitations never impairs a contract. On the other hand, Green *v.* Biddle holds that the mere imposition of the burden of paying for the improvements made by an adverse occupant violates the Compact. But the case now at bar not merely imposes a burden but purports to forfeit all.

Again, a few years later, the Court refers to Green *v.* Biddle as deciding that the Kentucky occupying claimants law is invalid, but held plaintiffs in error were not entitled to raise the question, because they were only sureties on a voluntary bond in the ejectment suit, and that the State Court may have decided the case on grounds not affecting the constitutionality of the statute (McKinney *v.* Carroll, 12 Pet., 66, 69).

Poole v. *Fleeger* (11 Pet., 185) came before this Court in 1837 in error to the Circuit Court for the District of West Tennesse. Ejectment begun in 1832 for 2,700 acres of land in Tennesse, by plaintiffs (defendants in error) deriving title under a Kentucky grant issued in 1796 upon a Virginia military warrant of 1784 (*Id.*, pp. 186, 207). Plaintiffs read in evidence the Compact of 1820 between Kentucky and Tennesse fixing a disputed State boundary and providing among other things that claims on Virginia military warrants to land within certain formerly disputed

lines, including the premises in question, shall not be prejudiced by the establishment of the line "but such claims shall be considered rightfully entered or granted and the claimants may enter upon said lands or assert their rights in a Court of Justice without prejudice by lapse of time or any statute of limitations for any period prior to the settlement of the boundary between the two States (*Id.*, 187, 208); that "*All private rights and interests of lands*" between certain designated lines, including the premises in question, "heretofore derived from Virginia, North Carolina, Kentucky or Tennesse shall be considered as rightfully emanating from either of those States and . . . *the validity of each claim shall be tested by the laws of the State from which it emanated*, and the contest shall be decided as if each State respectively had possessed the jurisdiction and soil and full power and right to authorize the location, survey or grant, according to her own rules and regulations" (*Id.*, p. 188).

Defendants claimed under patents from North Carolina and Tennessee in 1786, 1792 and later years down to 1812 and continuous possession from on or about the dates of the patents (*Id.*, 189–190).

Plaintiff below recovered judgment on a verdict under instructions to the jury "that as by the compact between Kentucky and Tennessee the boundary line of 35 degrees, 30 minutes north, was fixed several miles south of Walker's line and of the land in controversy, the title of the defendants were subject to the Compact and could only be sustained under it. That the State of Tennessee by sanctioning the compact, admitted in the most solemn form that the lands in dispute were not within her jurisdiction, nor within the jurisdiction of North Carolina at the time they were granted and that *consequently the titles were subject to the conditions of the compact.*" The validity of the defendant's exception to this instruction was the main subject of inquiry in this Court, as the Court itself says (*Id.*, p. 209). This Court sustained the instruction and affirmed the judgment for plaintiff, and by Mr. Justice Story, said:

"We are of opinion that the instruction given by the Court below is entirely correct. . . . The Com-

pact, then, has full validity, and all the terms and conditions of it must be equally obligatory upon the citizens of both States" (11 Pet., 209).

1840—*Pollard* v. *Kibbe* from the Supreme Court of Alabama, in ejectment by Pollard's heirs claiming title to a lot in Mobile under acts of Congress disposing of the title derived under treaty with Spain. Mr. Justice Baldwin in a concurring opinion supports the decision also on other grounds, and in reviewing many of the prior cases relating to the construction of treaties and compacts, says:

"Green *v.* Biddle arose on the compact between Virginia and Kentucky, the seventh article of which stipulated that all private rights and interests of lands derived from the laws of Virginia, 'shall remain valid and secure' under the laws of Kentucky, and shall be determined by the laws then existing in Virginia, etc. The Court held that such rights must be exclusively determined by the law of Virginia, and that their security and validity could not be impaired by a law of Kentucky. That the compact intended to preserve all private rights derived from Virginia, as valid under the laws of Kentucky as they were under the *then existing* laws of Virginia, so as to preserve the beneficial proprietary interest of the rightful owner in the same state in which they were by the laws of Virginia *at the time of the separation;* and *to use all existing remedies* which would prevent those rights from being impaired (8 Wheat., 13, 16, 89, 90, 92)." "The same principles were re-affirmed in Hawkins *v.* Barney, on the same compact" (5 Peters, 464, 465). . . . "In Green *v.* Biddle, it was held that by the principles of general law, independent of a compact, the titles to real estate can be determined only by the laws of the State under which they were acquired." "Every government has, and from the nature of sovereignty, must have the exclusive right of distribution and grants of the public domain within its boundaries, until it yields it up by compact or conquest. The validity of a title can be judged of by no other rule than those laws in which it had its origin; and a title, good by those laws, cannot be disregarded, but by a departure from the first principles of justice. '*If the article, therefore, meant only to provide for the affirmation of that which is the universal rule in the courts of civilized nations, professing to be governed by the dictates of law, it was a mere nullity*'" (14 Pet., 414).

1843—*Bronson* v. *Kinzie*, from the Circuit Court for Illinois upon questions certified, whether decree in foreclosure of mortgaged premises should be entered and sale thereunder made without regard to provisions of Statutes of Illinois enacted after the mortgage was made and requiring valuation of the premises before sale and granting right of redemption to the mortgagor and his creditors for 12 and 15 months after sale. Mr. Chief Justice Taney, delivering the opinion of this Court said:

"Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself."

"In either case it is prohibited by the Constitution."

"This subject came before the Supreme Court in the case of Green *v.* Biddle, decided in 1823, and reported in 8 Wheat., 1. It appears to have been twice elaborately argued by counsel on both sides, and deliberately considered by the Court. On the part of the demandant in that case, it was insisted that the laws of Kentucky passed in 1797 and 1812, concerning occupying claimants of land, impaired the obligation of the compact made with Virginia in 1789. On the other hand, it was contended that these laws only regulated the remedy, and did not operate on the right to the lands. In deciding the point the Court say, 'It is no answer that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests.' And in the opinion delivered by the Court after the second argument, the same rule is reiterated in language equally strong (see pp. 75, 76 and 84). *This judgment of the Court is entitled to the more weight, because the opinion is stated in the report of the case to have been unanimous, and Judge Washington, who was the only member of the Court absent at the first argument, delivered the opinion of the second.*"

"*We concur entirely in the correctness of the rule above stated.*

"It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which in the form of remedy

impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there was any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impracticable to pursue it" (1 How., 316).

Mr. Justice McLean, dissenting, contended that the question in Green *v.* Biddle did not arise under the mere provisions of the National Constitution, but under the Compact, by which, as the Court held "the rights and interests of the Virginia claimant, both as to their nature and extent, were to be exclusively determined by the laws of Virginia" (1 How.. 327-328).

1851—*Pennsylvania* v. *Wheeling, etc., Bridge Co.*, in original jurisdiction of the Supreme Court, bill for mandatory injunction to remove suspension bridge as an obstruction to navigation of the Ohio River; before the Court four times in different stages of the suit (9 How., 647; 11 How., 528; 13 How., 518; 18 How., 421). On the third hearing the Court directed the abatement of the bridge unless it should be altered as directed, and by Mr. Justice McLean said:

"On the 18th of December, 1789, an Act was passed by Virginia, consenting to the erection of the State of Kentucky out of its territory on certain conditions. . . . This Compact by the sanction of Congress *has become a law of the Union*. What further legislation can be desired for judicial action?

"In the case of Green *et al. v.* Biddle, 8 Wheat., 1, this Court held that a law of the State of Kentucky, which was in violation of this Compact between Virginia and Kentucky was void; and they say this Court has authority to declare a State law unconstitutional, upon the ground of its impairing the obligation of a Compact between different States of the Union." . . .

"No State law can hinder or obstruct the free use of a license granted under an Act of Congress. *Nor can*

any State violate the compact, sanctioned as it has been, by obstructing the navigation of the river."

13 How., 560-565.

This decision is an emphatic declaration of the binding obligation of the Compact, and that it is the source of rights that would not exist without it; for the Court so held against the dissenting opinions of Mr. Justice Taney and Mr. Justice Daniels, who argued that the Compact and Act of Congress approving it, should be "construed to mean nothing more than that the river shall be as free to the citizens or subjects for which the other party contracts as it is to the citizens or subjects of the State in which it is situated" (13 How., 583), and that the Act of Congress approving the Compact was not in effect a regulation of the navigation of the Ohio River (*Id., Ib.;* 13 How., 601).

When the case came up again, on motion for attachment for contempt of the Bridge Company in disregarding the injunction of one of the Justices of the Court against re-erecting the main bridge which had been blown down by a gale after the Supreme Court had directed its removal in 1852, and after an Act of Congress, Aug. 31, 1852, (enacted after rendering but before execution of the decree of the Supreme Court), had declared the bridge in its then condition to be a lawful structure and post road, Mr. Justice Nelson, writing for the Court, said:

"It is also urged that this Act of Congress is void, for the reason that it is inconsistent with the compact between the States of Virginia and Kentucky, at the time of the admission of the latter into the Union, by which it was agreed, 'that the use and navigation of the River Ohio, so far as the territory of the proposed, or the territory that shall remain within the limits of this Commonwealth, lies thereon, shall be free and common to the citizens of the United States,' and which compact was assented to by Congress at the time of the admission of the State."

"This court held, in the case of Green *et al. v.* Biddle, 8 Wheat., 1; 5 Curtis, 345, that an Act of the Legislature of Kentucky in contravention of the compact, was null and void, within the provision of the Constitution forbidding a State to pass any law impairing the obligation of contracts.

"But that is not the question here. The question here is, whether or not the compact can operate as a restriction upon the power of Congress under the Constitution to regulate commerce among the several States. Clearly not. Otherwise Congress and two States would possess the power to modify and alter the Constitution itself."

"This is so plain that it is unnecessary to pursue the argument further. But we may refer to the case of Wilson *v.* Mason, 1 Cranch, 88, 92; 1 Curtis, 346; where it was held that *this compact* which stipulated that rights acquired under the Commonwealth of Virginia shall be decided according to the *then existing* laws, could not deprive Congress of the power to regulate the appellate jurisdiction of this court, and prevent a review where none was given in the state law existing at the time of the compact." Penna. *v.* Wheeling, etc., Bridge Co., 18 How., 432.

Four of the Justices dissented, among them Mr. Justice McLean, who said:

"The Compact between Virginia and Kentucky, which 'declared that the use and navigation of the River Ohio should be free and common to the citizens of the United States,' was incorporated into the Kentucky Constitution of 1791, and received the sanction of Congress in the admission of that State into the Union. This compact bound both parties; and this Court held that a violation of it by a law of Kentucky, called the Occupying Claimant Law, was void, as it impaired the obligation of the compact.

"Virginia, no more than Kentucky, could violate any of its provisions, although they extended to citizens of the Union" (*Id.*, p. 439).

1853—*Curran* v. *Arkansas*, from Supreme Court of Arkansas—Bill in equity seeking aid of the Court to reach assets of an insolvent State bank, on the ground that Statutes of the State enacted after the incorporation of the bank impaired the obligation of the bank's contract with complainant as holder of its demand notes, by impairing complainant's remedy against the assets of the bank. The Supreme Court of the United States reversed the judgment of the State Court, and, speaking by Mr. Justice Curtis, said:

"But it by no means follows because a law affects only the remedy that it does not impair the obligation of the contract. The obligation of a contract, in the

sense in which those words are used in the Constitution, is that duty of performing it, which is recognized and enforced by the laws. And if the law is so changed that the means of legally enforcing this duty are materially impaired, the obligation of the contract no longer remains the same.

"This has been the doctrine of this Court from a very early period.

"In Green *v.* Biddle, 8 Wheat., 1, Mr. Justice Washington, delivering the opinion of the Court, said: "It is no answer that the Acts of Kentucky now in question are regulations of the remedy and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests." In Bronson *v.* Kinzie, 1 How., 311, Mr. Chief Justice Taney, delivering the opinion of the Court, and speaking of the above rule as laid down in Green *v.* Biddle, said: "We concur entirely in the correctness of the rule above stated. The remedy is the part of the municipal law which protects the right, and the obligation by which it enforces and maintains it. It is this protection which this clause in the Constitution was mainly intended to secure" (15 How., 316, 319).

1866—*United States* v. *Quincy* (4 Wall, 535, 550), from the Circuit Court for Southern District of Illinois, on the question whether the Legislature of Illinois could by later legislation restrict the power of a city to collect a tax to meet an obligation which the Legislature had before authorized the city to contract and to discharge by taxes to be collected. This Court, holding that "neither the State nor the corporation can any more impair the obligation of the contract in this way than in any other," Mr. Justice Swayne, in the course of the opinion, said:

"It is also settled that the laws which subsist *at the time and place of the making of a contract*, and where it is to be *performed, enter into and form a part of it as if they were expressly referred to or incorporated in its terms.* This principle embraces alike those which affect its validity, construction, discharge and enforcement." . . . "In Green *v.* Biddle the subject of laws which affect the remedy was elaborately discussed. The controversy grew out of a compact between the States

of Virginia and Kentucky." . . . "By two Acts of the Legislature of Kentucky, passed respectively in 1797 and 1812, several new provisions relating to the consequences of a recovery in the action of ejectment, all eminently beneficial to the defendant and onerous to the plaintiff, were adopted into the laws of that State. So far as they affected the lands covered by the compact, this Court declared them void. It was said: 'It is no answer that the Acts of Kentucky, now in question, are regulations of the remedy and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they overturned his rights and interests.'" . . . "The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden. In Green *v.* Biddle, 8 Wheat., 84, it was said: 'The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation'" (4 Wall., 548, 550, 553).

1882—*Transportation Co.* v. *Parkersburg* from Circuit Court for West Virginia. Decree affirmed dismissing bill in equity to restrain collection of wharfage charges imposed by ordinance of respondent. The Court distinguishes the case of Pennsylvania *v.* Wheeling Bridge Co. (*supra*) on the ground that that case was based among other grounds, on the Compact between Virginia and Kentucky and quotes the opinion: "*This compact by the sanction of Congress has become a law of the Union*" (107 U. S., 691, 705); whereas the Court holds that in Transportation Co. *vs.* Parkersburg "the gravamen of the bill is really nothing but a complaint against exhorbitant rates of wharfage" (*Id.*, *Ibid*) and hence not affected by the Compact. Mr. Justice Harlan, dissenting, contended that even the levying of duties of tonnage was inconsistent with the Compact (*Id.*, p. 708).

In *Edwards* v. *Kearzey* (96 U. S., 595), after quoting with approval from the opinion in Green *v.* Biddle, this Court says:

"One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not by the Constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation—dispensing with any part of its force." Bank *v.* Sharp, 6 How., 301."

In *Indiana* v. *Kentucky* this Court sustained the claim of Kentucky under the Compact to lands in the Ohio River (136, U. S. 479) and in *Henderson Bridge Co.* v. *Henderson*, 173 U. S., 610, involving Kentucky's jurisdiction over the same River this Court again refers to the Compact.

In *Stearns* v. *Minnesota*, this Court said:

"That a state and the nation are competent to enter into an agreement of such a nature with one another has been affirmed in past decisions of this Court, and that they have been frequently made in the admission of new states, as well as subsequently thereto, is a matter of history. Section 10 of Article I of the Constitution provides that 'no state shall, without the consent of Congress . . . enter into any agreement or compact with another state.' It was early ruled that these negative words carried with them no denial of the power of two states to enter into a compact or agreement with one another, but only placed a condition upon the exercise of such power. Thus in Green *v.* Biddle, 8 Wheat., 1, a compact between Virginia and Kentucky was sustained, and *it was held no valid objection to it that within certain restrictions it limited the legislative power of the State of Kentucky.* In Poole *v.* Fleeger, 11 Pet., 185, an agreement between Kentucky and Tennessee as to boundary was upheld . . .

"The same doctrine was announced in Virginia *v.* Tennessee, 148 U. S., 503, and in the opinion in that case it was intimated that there were many matters in respect to which the different states might agree without the formal consent of Congress" (179 U. S., 245).

In *Wedding* v. *Meyler*, involving the jurisdiction of an Indiana Court to serve process on the Ohio River, which

depended on the boundary of Kentucky as fixed by the Virginia Compact, this Court reversed the decision of the Kentucky Court of Appeals (107 Ky., 310; 53 S. W., 809), and Mr. Justice Holmes refers to the Compact and the Act of Congress thereon and quotes the words of this Court in Pennsylvania *v.* Wheeling, etc., Bridge Co. (*supra*, p. 140): "*This Compact by the sanction of Congress has become a law of the Union*," and thereupon says:

"In the case of Kentucky the 'compact' which the Virginia Statute has been treated by this Court as creating (Green *v.* Biddle, 8 Wheat., 1, 16, 90, 92), may be regarded as having been, in the first stage, *not only a law but a continuing offer to the expected new state when it should come into being, which was accepted by that state when it came into being on the terms prescribed*" (192 U. S., 573, 582).

From all of which it appears:

(1) That the Courts of Kentucky have sometimes respected the obligations of the Compact and construed it to prevent forfeitures of Virginia titles (*supra*, p. 116).

(2) That the defiance by the Courts of Kentucky of the decision of this Court in Green *v.* Biddle (*supra*, p. 114) is based on erroneous statements that it was not by a majority of the Court (*supra*, p. 115) which statement has been corrected by this Court (*supra*, p. 122).

(3) That the decision in Green *v.* Biddle was very well considered (*supra*, p. 122) and applied afterwards in declaring void a similar statute of another State (*supra*, p. 128) and has been approved and reiterated again and again by this Court (*supra*, pp. 129–146).

(4) That the decision in Hawkins *v.* Barney is entirely consistent with Green *v.* Biddle (*supra*, p. 130).

(5) That the Commonwealth of Kentucky derives from the Compact not merely its existence, but also other rights, to protect which it has asserted the Compact, and been sustained by this Court (*supra*, p. 145). It would seem to be "a poor rule that does not work both ways."

(*a*) *According to the laws of Virginia existing at its date, to wit, the 18th day of December, 1789.*

Neither the decision in Green *vs.* Biddle nor in Hawkins *vs.* Barney construed the Compact to permit Kentucky to follow Virginia in any more stringent laws of forfeiture than those which existed in Virginia *at the time of the Compact.*

Under this Compact any laws of Kentucky that render the rights and interests less "valid and secure" than they were under the laws of Virginia on the 18th of December, 1789 are absolutely void.

In Green v. Biddle, Mr. Justice Story in delivering the opinion of the Court opens the discussion with the question: "Are the rights and interests of lands lying in Kentucky derived from the laws of Virginia prior to the separation of Kentucky from that State, as valid and secure under the above acts as they were under the laws of Virginia *on the 18th day of December, 1789?*" (8 Wheat., 69), and because the Court found that the acts in question would render such right and interests less valid and secure the Court held those acts to be unconstitutional and void (*Id.*, 92-93).

The current of authority establishes, without serious conflict, as we conceive. . . . "That the laws in force, *when and where the contract may be made form a part of it.*"

Collins *v.* Collins, 79 Ky., 92.

The provision of the Federal Constitution forbidding any State to impair the obligations of contracts applies to all statutes passed since March 3, 1789 (Owings *vs.* Speed, 5 Wheat., 520).

(*b*) *Contemporaneous Construction is entitled to great weight.* So held as to Act of 1851 showing how Kentucky Constitution of 1850 was understood, in Collins *v.* Henderson, 74 Ky., 74.

"Great weight has always been attached to contemporaneous exposition."

Chief Justice Marshall in Cohens *v.* Virginia, 6 Wheat., 418.

This rule applies especially where the statute is ancient and the construction that of contemporaries who had special knowledge of the subject. Martin *v.* Hunter, 1 Wheat., 351; Gardner *v.* Collins, 2 Pet., 85; Pease *v.* Peck, 18 How., 595; 23 Am. & Eng. Encyc. of L. (1st Ed.), p. 340.

In construing the Federal Constitution this Court sometimes refers to contemporaneous documents and the statements of those who introduced propositions or debated them in the Constitutional Convention. (See, for instance, Pennsylvania *v.* Wheeling, etc., Bridge Co., 18 How., 421, 459); and to give effect to the object designed the Court will examine all the provisions in the light of attendant and surrounding circumstances. (Ross *v.* McIntyre, 140 U. S., 453.)

The Compact was framed by the Legislature of Virginia and accepted by the people of the District of Kentucky while the conflicting claims of grantees of Pennsylvania and of Connecticut for lands in the Wyoming Valley, and while the conflicting claims of grantees of New York and of other States for lands in the district of Vermont, were still undetermined. "Pennsylvania dissipated the clouds of civil war by a series of Acts dictated by a spirit of justice and toleration, by which the lands of actual settlers were confirmed to them" (in the Wyoming district) (Carson, Supreme Court of U. S., Vol. I., p. 73). "Many futile discussions (over the New York-Vermont contest) were held in Congress, which were participated in by the leading statesmen of the day; and at one time the conduct of the "pretended State of Vermont" was severely animadverted upon, and restitution required to be made to persons who had been condemned to banishment and confiscation of property. In 1781 Massachusetts assented to the recognition of Vermont, . . . and New York in 1790" (*Id.*, p. 79).

Only about two years before the date of the Compact Alexander Hamilton, in The Federalist, had stated that one motive for the opposition to the claim of New York to the district of Vermont was "the interest of certain individuals of influence in the neighboring States, who had obtained grants of lands under the actual government of

that district" (The Federalist, No. 7, Nov. 17, 1787, Ford's Ed., p. 36).

The framers of the Virginia Compact had, therefore, from contemporary happenings, good reasons for foreboding that the seventh clause to protect private rights and interests in land was necessary; the best proof of which is that what may reasonably have been foreboded has actually happened. The Article III of the Kentucky Act of 1906 was instigated for the purpose, and is intended to wrest from the true owners under the Virginia patents the wild lands that have never been enclosed, cultivated or actually occupied or improved by any one, and to vest that title in the occupants of adjoining enclosed lands by virtue of a claim of title under bogus "patents" for which they paid five cents per acre to Kentucky officials who purported to issue them under Acts of Kentucky Legislature which prohibited them and declared them to be absolutely null and void if the land had been already appropriated; the ultimate object being to vest the title, through the occupants, in the instigators of Article III who have bought claims to mineral rights from the occupants (*supra*, p. 20; *infra*, p. 303).

At the time of this Compact the Constitution of Virginia did not prohibit the Legislature from divesting an owner of his property without due process of law, or by impairing the obligation of contracts, and it was then uncertain what the Constitution of Kentucky would be or how it might be altered. It was, therefore, the intention of the Compact to protect the rights and interests of those who had appropriated land under the Virginia laws and to prevent such rights and interests from being forfeited and confiscated in any way that was not provided for by the laws of Virginia as they "now" (December 18, 1789) "exist in this State" (Virginia).

At the time of the Compact in 1789 the country was already covered with Virginia entries, "interfering" with each other and causing endless litigation (*infra*, p. 293). The Compact expressly prohibits Kentucky from adding to the trouble by making any grants that should "interfere" (*supra*, p. 98). How is

it possible to hold that grants by Kentucky officials give "color of title" against a title under a Virginia entry, without violating both the letter and spirit of the Compact?

(c) *Compacts between States are subject to same rules of construction as contracts between individuals.* (Green *v.* Biddle (*supra*); Virginia *v.* Tennessee, 148 U. S., 503; Davis *v.* Gray, 16 Wall., 203; U. S. *v.* Mayor of New Orleans, 103 U. S., 358; Prov. Bk. *v.* Billings, 4 Pet., 514; Home for Friendless *v.* Rouse, 8 Wall., 430; Farrington *v.* Tennessee, 95 U. S., 679; N. J. *v.* Yard, 95 U. S., 104; Mech. Bank *v.* Thomas, 18 How., 384; Piqua Bank *v.* Knoop, 16 How., 369; Dartmouth College case, 4 Wh., 518). "That the same rules of contract are applicable where the sovereign is a party is admitted;" Hunter *v.* United States, 5 Peters, 185.

(d) *In the construction of a compact between States the same rules should be applied as to treaties.* United States *v.* Reynes, 9 How., 127.

(e) *The Court will give it judicial meaning and interpretation as a contract on the principles of justice and the rules of equity.*

United States *v.* De la Maza Arredonda, 6 Pet., 691.
Chew Heong *v.* United States, 112 U. S., 536.
De Geoffroy *v.* Riggs, 133 U. S., 258.

(f) *And will interpret it in a spirit of uberrima fides.*

Tucker *v.* Alexandroff, 183 U. S., 424.

"Treaties must receive a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose" said Mr. Chief Justice Fuller for this Court in Wright *v.* Henkel, 190 U. S. at page 57.

This Court in exempting a grantee from forfeiture for failure to settle and improve his lands which was required as a condition precedent in his grant under the Pennsyl-

vania act of April 3, 1792, speaking by Mr. Chief Justice Marshall, said:

"This is a contract; and although a state is a party, it ought to be construed according to those well established principles which regulate contracts generally.

"The State is in the situation of a person who holds forth to the world the conditions on which he is willing to sell his property. If he should couch his propositions in such ambiguous terms that they might be understood differently in consequence of which sales were made, and the purchase money paid, he would come with an ill grace into Court to insist on a latent and obscure meaning, *which would give him back his property, and permit him to retain the purchase money.* All those principles of equity and of fair dealing which constitute the basis of judicial proceedings, require that Courts should lean against such a construction."

Huidekoper *v.* Douglass, 3 Cranch, 1, 70–71.

"Although the obligations of a State rest for their performance upon its honor and good faith and cannot be made the subjects of judicial cognizance unless the State consents to be sued, or comes itself into Court, yet where property or rights are enjoyed under a grant or contract made by the State, they cannot wantonly be invaded. Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property rights acquired under its contract may be judicially resisted, and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment."

Hans *v.* Louisiana, 134 U. S., 1, 20, quoted and followed in Pennoyer *v.* McConnaughy, 140 U. S., 1, 18.

In sustaining under the Virginia-Pennsylvania Comacpt a merely equitable title from Virginia against a legal title to the same land from Pennsylvania this Court said:

"The terms therein of reserve and confirmation of the rights which had been previously acquired from Virginia in the territory thereby relinquished to Pennsylvania must from the nature of the transaction be *expounded favorably for those rights.*"

Sims *v.* Irvine, 3 Dall., 425, 456.

(*g*) *This Court will not alter, amend or add to any treaty* by inserting any clause small or great, any more than in a law.

The Amiable Isabella, 6 Wheat., 1.

Congress is bound to regard treaties, and has no power to nullify titles vested thereunder.

Reichert *v.* Felps, 6 Wall., 160.

Cited in Jones *v.* Meehan, 175 U. S., 32.

(*h*) *In solemn treaties "it never can be presumed that either state intends to provide the means for perpetrating or protecting frauds."*

United States *v.* The Amistad, 15 Pet., 518.

(*k*) *"Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred."*

Hauenstein *v.* Lynham, 100 U. S., 483.

There is no rule of interpretation applicable to treaties, or to private contracts which would authorize the Court to make exceptions by construction where the parties have not thought proper to make them.

Society for Propagation of the Gospel *v.* New Haven, 8 Wheat., 464.

An Act of 1806, declaring that persons in the actual possession of vacant and unappropriated land in the state on May 1st of that year shall be entitled to a preference of entering the same for a given period upon a good and valid warrant, in so far as it gives a preference to such persons over persons claiming under North Carolina, held void, as violating the compact between Tennessee and North Carolina, providing that no preference shall be given to citizens of Tennessee over persons claiming under North Carolina. Bass *v.* Dinwiddie, 3 Tenn. (Cooke), 130.

As under the compact of 1806, between the United States and North Carolina and Tennessee, the United States deeded certain lands to the State in trust for the use of the schools of the townships, the statute of 1825, so far as it allows such sections to be sold and granted to purchasers, is unconstitutional. Lowry *v.* Francis, 10 Tenn. (2 Yerg), 534.

By compact with the United States a law was passed in Indiana exempting lands in the State sold by the United States from taxation for five years from the sale. In 1847 Congress gave power to the State to tax such lands from the day of sale. *Held*, that a repeal of the act of Indiana was void as to lands purchased within five years before such repeal, as impairing the con-

tract with the purchasers. Thompson *v.* Holton, Fed. Cas. No. 13,958 (6 McLean 386).

By concurrent acts of the legislatures of two states, a bridge company was made a corporation of each state, and authorized to fix rates of toll over a bridge to be constructed by it over a navigable river between the states; and Congress afterwards declared the bridge a lawful structure, but made no provision as to tolls. *Held*, that Congress thereby manifested the intention that the rates of tolls should be as established by the two states, and that the acts of incorporation constituted a contract between the corporation and both states, which could not be altered by one state without the consent of the other. Covington & C. Bridge Co. *v.* Kentucky, 154 U. S., 204, reversing (Ky. 1893) 22 S. W., 851.

A contract made by the republic of Texas, given by its president on the 8th of January, 1844, with one Mercer, whereunder certain located lands within certain prescribed limits were granted to secure such contract, cannot be impaired by an act of the state of Texas where, by the compact of annexation, the state assumed all obligations theretofore bearing on the republic of Texas. Preston *v.* Walsh (C. C.), 10 Fed., 315.

(*l*) *It is conclusively presumed that both States understood the conditions of the Compact.*

"No treaty has been held void on the ground of misapprehension of the facts by either or both parties."

Rhode Island *v.* Massachusetts, 4 How., 635.

In construing the Compact of 1803 between Virginia and Tennessee, not very many years ago, this Court said:

"The compact in this case having received the consent of Congress, though not in express terms, yet impliedly and subsequently, which is equally effective, became obligatory and binding upon all the citizens of both Virginia and Tennessee," and again the Court states it was "binding upon both States and their citizens. Neither can be heard at this date to say that it was entered into upon any misapprehension of facts."

Virginia *v.* Tennessee, 148 U. S., 525, 527 (citing Rhode Island *v.* Massachusetts, *supra*).

(*m*) *The Compact restricts the decisions of the courts* as well as the Acts of Legislature of Kentucky.

In Bodley *v.* Taylor this Court, by Chief Justice Marshall, said:

> "Neither is the Compact between Virginia and Kentucky considered as affecting this case. If the same measure of justice be meted to the citizens of each State, if laws be neither made *nor expounded* for the purpose of depriving those *who are protected by that Compact*, of their rights, no violation of the Compact is perceived" (5 Cranch, 191, 223).

This is in accordance with the reiterated judgments of this Court, that a State cannot through any of its officers, whether executive, administrative, legislative or judicial, either intentionally or unintentionally, violate the obligations imposed on the State by the Federal Constitution, and if they do so, they act, not as representatives of the State, but as individuals without authority.

This Court has already expressly held that the controversy

> "is not to be determined by the laws or decisions of either State, and the rule of decision for the United States Supreme Court is not to be collected from the decisions of either State, but *is of an international* character."
>
> Lessee of Marlatt *vs.* Silk, 11 Peter, 1.

And that under this Compact Federal Courts have jurisdiction irrespective of citizenship, and even where all parties are residents of Kentucky, if the suit is by claimants under a Virginia patent against claimants under a Kentucky patent.

Colson *vs.* Lewis, 2 Wheat., 377.

(5) The compact is violated by Article III.

The lands described in the appellant's petition are claimed under entries made in the Land Office of Virginia prior to the separation of Kentucky, upon land warrants of Virginia, and surveys and patents granted upon such entries (Record No. 223, fols. 13-21; 49-56; 68-82; 95-112).

Article III, so far as it attempts to effect a forfeiture of these "private rights and interests of lands" now in Kentucky, derived from the laws of Virginia prior to the separation, is unconstitutional because it is directly prohibited by the compact which expressly provides that such

rights and interests "shall remain valid and secure," and shall be determined by the laws now (*i.e.*, December 18, 1789) existing in this State (*i.e*, Virginia) (*supra*, p. 147).

Hence the Compact is violated by Article III

(*a*) **Because the intention of Virginia by the Compact to protect the title under the earliest patent, as evidenced by contemporaneous acts** has been already shown (*supra*, p. 147) and is also shown on the records of its Legislature that framed the Compact and, among others, by the following. On July 5, 1780, the General Assembly of Virginia in a resolution "respecting boundary between North Carolina and Virginia," said:

> "Resolved therefore, that it be represented to the assembly of North Carolina, that there were under the regal government several modes of gaining a title to lands, none of which became complete, except by the obtaining of a patent written on parchment and signed by the governor for the time being; and that a claim to unappropriated land was only supportable between the time of entry and the time of obtaining such patent after which the title of the patentee became indefeasible unless by another patent of prior date. That no title by settlement was recognized under the said former government, such title being first established by a resolution of convention of the 24th day of May, 1776, which declared "that all persons settled on any unlocated or unappropriated lands to which there was none other just claim, should have the pre-emption or preference in the grant of such lands" . . . This assembly . . . must also inform the said assembly (of North Carolina) that *patentees and purchasers under them* have a right by the laws of this State to a *preference to all other claims*, and that a deprivation of this right would involve several fair and *bona fide* purchasers in unmerited loss, since *they could never have foreseen that which was thought to be impossible, to wit: that a title under an express patent might be defeated*" (10 Hening Stats. Va., p. 542).

In the next following year the same General Assembly pursuing the same object in a "Representation to North Carolina" dated the 12th of June, 1781, says:

> "How is it that the state of North Carolina have claimed their territory by charter from the King of England and yet deny efficacy to patents derived from

the same source? If these charters are valid to define the limits of States are not patents which possess the same foundation valid to prescribe the bounds of private ownership? If the legislature of North Carolina should explode the authority of these patents they may draw themselves into a disagreeable predicament with respect to the United States, which needs only to be hinted at to be understood . . . The Assembly of Virginia do not wish the legislature of North Carolina to act in a judicial capacity, by saying that the title of any individual is to be preferred, but they ask them *to establish the best Virginia title in whomsoever it may be placed* and to direct that the *laws and usages of Virginia heretofore made* shall be the rule of determination; leaving the several claimants to prosecute their titles in the usual channels" (*Id.*, p. 543, 544).

The same General Assembly on December 7, 1791, in ratifying the agreement between Virginia and North Carolina fixing the boundary lines between the States, declared

> "that in all Courts of law and equity within this Commonwealth the claims for lands lying between the line commonly called Walker's line and the line commonly called Henderson's line shall be decided *in favor of the oldest title*, whether derived from this Commonwealth or from the State of North Carolina" (13 Hening Stats. 258).

These declarations show not only the intention to protect the oldest title but some of the reasons from the experience of Virginia itself in addition to the reasons derived from the experience of other States which were then common knowledge (*supra*, p. 148), why the provisions of the Compact were intended to be much more than a *brutum fulmen* when they declared that the private rights and interests thereunder were to be and remain as "valid and secure" as they were under the laws of Virginia at the date of the Compact.

(*b*) Because the Compact restricts the powers of Kentucky with respect to attempts at forfeiture to the laws existing in Virginia on December 18, 1789.

The minimizers of the Compact in seeking to construe it long after its date when the conditions existing at the time it was made had been forgotten, have in two or

three instances adverted to the Eighth Section (Fourth Article) of the Compact as if it opened the doors to a power of forfeiture by Kentucky of those rights and interests which the preceding Seventh Section had so carefully guarded. This suggestion first appears in the Opinion of the Court of Appeals in Kendal *v.* Slaughter, 1 A. K. Mar., 378, decided in 1818 (*supra*, p. 110) which perhaps was the occasion for the *dictum* of Mr. Justice Johnson in Hawkins *v.* Barney (*supra*, p. 135); and it seems to have been upon the *dicta* in these two cases and one other, all of which are quoted by the Court of Appeals (Record No. 223, fols. 176-179), that the Court bases its extraordinary statement that "the cases comment upon the fact and lay stress upon the point, that whatever Virginia herself *could* have done in *subsequent* legislation as affecting the titles in question, Kentucky might also do" (Record No. 223, fol. 180). This proposition, which if true, would have made the restrictions of the Compact mere words "signifying nothing" is supported neither by the actual decisions nor even by the *dicta* of the cases cited by the Court, but is contradicted by the express words of the Compact which limits the powers of Kentucky to the laws "now" (*i. e.* December, 18, 1789) existing "in Virginia," and is contradicted also by the decision of this Court in Green *v.* Biddle and other cases in this Court and the Court of Appeals of Kentucky which show that the Courts did not inquire into the laws of Virginia after the date of the Compact; and many of the decisions of the Court of Appeals already cited, declare void, because violations of the Compact, various enactments of the Kentucky Legislature, all of which *might* have been validly enacted by the Legislature of Virginia, whose Constitution did not protect the property of the citizen from Acts of the legislature.

In Green *vs.* Biddle in the first Opinion it is said "It is undeniable that no acts of a similar character were in existence in Virginia *at the time* when the compact was made, and *therefore* no aid can be derived from the actual legislation of Virginia to support them." "The seventh Article of the compact meant to secure all private rights and interests derived from the laws of Virginia, as valid

and secure under the laws of Kentucky as they were under the *then existing* laws of Virginia. To make these rights and interests so valid and secure it is essential to preserve the beneficial proprietary interest of the rightful owner in the same State in which they were, by the laws of Virginia *at the time of the separation.*" (Opinion by Mr. Justice Story, 8 Wheat., pp. 13, 16); and after reargument, the Court by Mr. Justice Washington, opens the consideration of the case, with the question, "Are the rights and interests in land lying in Kentucky, derived from the laws of Virginia prior to the separation of Kentucky from that State, as valid and secure under the above acts as they were under the laws of Virginia *on the 18th of December, 1789*" (Opinion of Mr. Justice Washington, 8 Wheat., at p. 69)

Neither in Green *vs.* Biddle nor in Hawkins *vs.* Barney does the Court consider any legislation of Virginia after 1789; and in a very recent case the Supreme Court in construing the provision of the West Virginia Constitution of almost precisely similar terms (except as to the date) reviews the Virginia laws prior to the creation of West Virginia but *not after* that date (King *vs.* Mullins, 171 U. S., at pp. 410–412).

This (it is submitted) error of the Kentucky Courts in construing the Compact may have been partly due in the later cases to a misconstruction of dicta of Mr. Justice Johnson in Hawkins *v.* Barney (5 Pet. 457) especially of his statement in referring to the decision in Green *vs.* Biddle, that "in all their reasoning on the subject they will be found to acknowledge that whatever course of legislation could be sanctioned by the principles and practice of Virginia would be regarded as an unaffected compliance with the Compact. Such we conceive to be all reasonable quieting statutes." "From as early a date as the year 1705 Virginia has never been without an act of limitation" (5 Pet. at p. 466). This is far from a statement that whatever Virginia had the power to do with regard to its own lands after the Compact, Kentucky might do (see *supra*, p. 157).

Another citation by the Court of Appeals from the

Opinion in Hawkins *v.* Barney, viz.: "If the seventh article of the Compact can be construed so as to make the limitation act of Virginia perpetual and unrepealable in Kentucky, then I know not on what principle the same rule can be precluded from applying to laws of descent, conveyance, devise, dower, courtesy, and in fact every law applicable to real estate" (Record, 223, fol. 179) shows that the Court regarded the limitation Act then in question as similar to the other laws there mentioned and thus distinguishes the decision from that in Green *vs.* Biddle, where it was conceded even by the land-owner as it is conceded now by the plaintiff in error, that the Compact does not prevent the alteration by Kentucky of laws of that character (Green *v.* Biddle, p. 64; see, also, *supra*, p. 132).

Finally the Court of Appeals in the cases at bar concludes by citing from the same opinion in Hawkins *v.* Barney the statement that "The last member of the eighth article of this Compact distinctly recognizes the existence of the power in Kentucky to pass similar laws; notwithstanding the restrictions of the seventh article, and also the probability of her resorting to the policy of such laws" (Record, 223, fol. 179).

This was probably derived from a dictum of Mr. Justice Johnson in Hawkins *v.* Barney, and refers to the end of Section 8 of the Compact which provides "nor shall a neglect of cultivation or improvement of any land either within the proposed state or this Commonwealth belonging to non-residents, citizens of the other, subject such non-residents to forfeiture or other penalty within the term of six years after the admission of said State into the Federal Union" (*supra*, p. 98), and appears to have been regarded by the Court of Appeals as showing that Virginia considered forfeitures possible by Kentucky in cases not then authorized by Virginia. But the Court was apparently unaware that at the time of the Compact very numerous Statutes providing for forfeitures for failure to improve lands were on the Statute books of Virginia.

In 1833 (two years after the delivery of Mr. Justice Johnson's Opinion in Hawkins *v.* Barney), Judge Under-

wood, delivering the opinion of the Court of Appeals of Kentucky, said:

"If there were any land in the district of Kentucky, which had been granted upon condition that the grants should be forfeited, unless the lands, or town lots, were cultivated or improved within a given period, there may have been good reason for inserting the fourth condition of the compact. . . .

I am inclined to believe, that there were lands, or town lots, at the date of the compact, titles to which depended upon cultivation and improvement. If so, the fourth condition of the compact had reference to these exclusively; and all ground of inference favorable to the power of forfeiting lands differently situated, is taken way, so far as it depends upon the said fourth condition."

Gaines *et al. v.* Buford, 31 Ky., 487.

The belief of the learned Judge was well founded.

The provisions of Section 8 of the Compact did not nullify the provisions of the preceding Section 7, but, on the contrary, added further restrictions to protect designated non-residents; for the laws of Virginia, *as they existed at the date of the Compact*, provided for forfeiture in the cases stated in Section 8, *i. e.* for failure to cultivate or improve.

The Virginia Act of 1779 for adjusting and settling the titles to unpatented lands, etc., states:

"And whereas several families for their greater safety have settled themselves in villages or townships under some agreement between the inhabitants of laying off the same into town lots, to be divided among them and have, from present necessity, cultivated a piece of ground adjoining thereto in common, Be it enacted that 640 acres of land whereon such villages and towns are situate and to which no other person hath a previous legal claim, shall not be entered or surveyed, but shall be reserved for the use and benefit of the said inhabitants until a true representation of their case can be made to the general assembly, that right and justice may be done therein . . . And if any such settlers shall desire to take up a greater quantity of land than is herein allowed them, they shall on payment to the treasurer of the consideration money required from other purchasers, be entitled to the pre-emption of any greater quantity of land adjoining to that allowed to them in consideration

of settlement not exceeding One thousand acres and to which no other person hath any legal right or claim." "And to prevent doubts concerning settlements, it is hereby declared that no family shall be entitled to the allowance granted to settlers by this act *unless they have made a crop of corn in that country or resided there* at least one year since the time of their settlement" (10 Hening Stat., pp. 39, 40). "In all disputes for the right of pre-emptions for improvements made on the land the persons . . . who made the first improvement . . . shall fix the quantity" (*Id.*, p. 45).

The time "to enter certificates for settlement rights and to locate warrants upon pre emption rights was from time to time extended. (See 12 Hening Stats., pp. 88, 237, 570).

The records of the session acts of Virginia from the time of opening the Land Office act of 1779 to the separation of Kentucky contain many acts *providing for forfeitures for failure to build on lots in towns, and declaring forfeitures "for not improving," and granting extensions of time to the owners "to save their lots from such forfeiture"* (see 10 Hening Stats., pp. 108, 135, 192, 294; 11 *Id.*, pp. 26, 29, 30, 37, 38, 139, 140, 171, 270, 335-337, 369; 12 *Id.*, pp. 224, 372, 596, 599, 626, 632, 633, 682-3, 717; 13 *Id.*, pp. 86, 149-150, 172, 178, 179, 298, 300). These acts are generally in almost precisely similar words, and relate indiscriminately to towns on the Eastern and on the Western waters, including the District of Kentucky. For instances, among those above cited, affecting lands in Kentucky, are an Act of October, 1779, for "Boonesborough, in the County of Kentucky" (10 Hen. St., 134–135); May, 1780, Louisville, Ky. (*Id.*, p. 294); October, 1785, Harrodsburg, Ky. (12 *Id.*, 224-5); October, 1786, Louisville (*Id.*, 372); October, 1787, Warwick and Bealsborough, Ky. (*Id.*, p. 631–2); December, 1787, Maysville, Ky. (*Id.*, p. 633–4); December, 1789, Harrodsburg and Louisville (13 *Id.*, p. 86); December, 1790, George Town, Woodford County, Ky. (*Id.*, p. 170, 172); Maysville, Ky. (*Id.*, p. 179).

The usual practice in establishing a new town was to appoint trustees to sell and convey lots on condition that the grantee should build "a dwelling house sixteen feet

square at least, with a brick or stone chimney," within a designated time (generally between two and five years), then often to extend the time because of "difficulty of obtaining materials," "depredations of savages," or similar causes, "and meanwhile to suspend forfeitures" for not improving (see Acts, *supra*).

Section 8 of the Compact was intended to extend that time in the case of designated non-residents for six years from the admission of Kentucky into the Federal Union, and thus to add a *further restriction* to that provided for in the preceding Section 7, which had provided merely for determining rights and interests of lands "by the laws *now* existing in this State."

Va. Act, Dec., 1790, "for surveying and apportioning the lands granted to the Illinois regiment and establishing a town within said grant" (13 Hening St., 149) repealing a prior act of 1783 requiring improvements (11 Hening, 385), expressly provided that "the said lots shall not be liable to forfeitures on account of any failure in improving the same, but that the titles thereof shall be absolute and unconditional, anything in said recited act to the contrary notwithstanding."

The provision in the Compact of Dec. 18, 1789, was to prevent the forfeiture of inchoate titles for six years, not to permit the forfeiture of complete legal titles after six years or at any other time.

To construe Section 8 to mean a permission to Kentucky to forfeit for lack of cultivation or improvement on grounds other than was permitted in Virginia at the time of the Compact would require the reading into the instrument something that is not there, and thereby make this clause contradict the other clauses providing that rights and interests shall remain secure and be determined according to the laws of Virginia existing "now" at the date of the Compact.

This would be contrary also to the construction of the Compact by the Court of Appeals of Kentucky, holding that a statute enacted on this theory (Ky. Acts, 1824, p. 443), forfeiting lands for failure to improve, was unconstitutional.

"This reckless and clumsy Statute was declared void

as a plain breach of the Compact with Virginia" (Dembitz, Ky. Jurisp., p. 163).

The case of Gaines ads. Buford (Ky. (1 Dana) 479, 517), has been already cited (*supra*, p. 116).

The Statute there held to be unconstitutional and void bears a strong resemblance to Article III of the Act of 1906 in its motive, its purpose and its method. It "was passed in 1824 *with a view to defeat outstanding titles*, by requiring all owners of large tracts to improve so many acres per hundred *within a short-named time and confiscating* their land *by way of penalty for the benefit of the occupant*" (Demb., Ky. Jurisp., p. 162). The main difference seems to be that the Article III of the Act of 1906 was intended not merely for the benefit of the occupant but for the benefit of the promoters of the Act, viz , prior grantees of the occupant "in privity with such persons, his heirs, representatives or assigns *as to the mineral or other interests or rights* in or appurtenant to such land" (*supra*, p. 16).

Even if it were possible to overrule this case of Gaines *v.* Buford, which has become a settled "rule of property" under which rights have since been acquired, the Compact so construed would merely justify forfeiture for failure to cultivate or improve and not for any other cause whatever. Otherwise the Compact is reduced to a folly. What was the use of carefully providing by one clause that rights and interests should remain "valid and secure," if they might be arbitrarily forfeited for any reason under another clause of the same document?

In short, the history of the Compact shows that until recent years it was regarded generally both by the Legislature and the Courts of Kentucky as containing lawful restrictions upon the powers of the Commonwealth, and the State has invoked successfully provisions of the same Compact which enured to its advantage (Indiana *v.* Kentucky, p. 145, *supra*), but, in the opinion of apparently impartial observers, has recently manifested an inclination to minimize its duties (Dembitz, cited *supra*, p. 120).

This Court has decided in Green *vs.* Biddle that the Compact prevented the enactment or enforcement of the occupying claimant laws, and in Hawkins *vs.* Barney

that it did not prevent the shortening of the Statute of Limitations to seven years. Whatever may be said of some of the dicta, the actual decisions are entirely consistent. The question now before the Court is whether the Compact does not prohibit the enactment and enforcement by a State of forfeiture as against the plaintiff in error under the conditions shown in the case at bar. Counsel for plaintiff in error cannot see how such a forfeiture can be sustained against the Compact without overruling Green *v.* Biddle and also making the Compact a mere mockery. For how can the forfeiture here in question, which confiscates the whole title, be valid if the statute construed in Green *v.* Biddle, which merely imposed a lien on the land for improvements is void? and against what did the Compact intend to make these titles "valid and secure" if not against an *ex post facto* confiscatory forfeiture which neither before nor at any time since the Compact was, or has been, possible under the laws of Virginia?

(*c*) Because at the date of the Compact there was no law permitting the forfeiture of lands for failure to enter them on the books or list them for taxation, nor even for any other cause, not even for treason.

In Virginia, prior to and at the time of the Compact with Kentucky, lands were not taxed till the patent had been issued.

By the Act of October, 1783, the General Assembly of Virginia declared that "*in lieu of forfeiture of lands in case of non-payment*" (of part of the purchase money for grants, *i. e.*, patents of lands) "*which is unreasonable and shall hereafter cease,*" the sheriffs were directed to sell only so much "as shall be the value of such debt" (11 Hening Stats., p. 347, 348).

The Act of October, 1786, made the penalty for failure to list £5 and treble the amount of the tax (12 Hening Stats., 249).

The Act of January 7, 1788, entitled "An Act to remedy abuses in the manner of selling lands for the payment of public taxes" recited that the manner of selling lands, as heretofore practiced by the various Sheriffs and collectors

for the payment of public taxes due thereon has in many instances produced gross oppression, for remedy whereof, in future, it was enacted that if the land would not yield a price equal to half its value, it should be bid in "on account of the public" "and the person who was chargeable originally with the said land tax, may discharge the same and be entitled to all the estate he held in such land in as full and ample a manner as if such sale had not been made" provided double the amount of the tax be paid within six months; but if not paid within two years the land was to be sold and the surplus proceeds "after paying the amount due to the public" was directed to be paid to the person who was owner at the time the land was bid in by the commissioner (12 Hen. Stat., 564, 565).

On Dec. 9, 1789, nine days before the date of the Virginia-Kentucky Compact of Dec. 18, 1789, the General Assembly of Virginia enacted that even in case of any person "attainted, convicted or *outlawed* of any treason, misprision of treason, murder *or felony whatsoever* there shall in no case be forfeiture to the Commonwealth of dower or *of lands*, slaves or personal estate, but the same shall descend . . . in like manner as is by law directed in case of persons dying intestate." "An act declaring the mode of proceeding in certain criminal cases passed the 9th of December, 1789" (Hening Stats. of Va., Vol. 13, p. 40).

"With the conditions and the reason such for the exercise of the right, the General Assembly of Virginia provided first, for a sale by the sheriff for nonpayment of taxes, by a series of acts from 1781 to 1791, when, finding this to fail of the main purpose, it followed with provision for forfeiture for the non-payment. This, too, after experience, proving short of the needs, because of the persistent neglect and refusal of many, especially non-residents, to have their lands entered for taxation, in 1810 provision was made for forfeiture for non entry. Of this Mr. Hutchinson says: 'We have seen that, so far, the policy of the State referred to the subject of lands delinquent for the non-payment of taxes. Another class of cases was now discovered requiring strong measures.' In the preamble of the Act of February 5, 1810,

is recited: 'It being represented to the General Assembly that many persons omit to enter their lands on the commissioner's books, and thereby elude the payment of any revenue tax thereon,' etc. (Acts 1809–1810, p. 17, c. 16).

"Wherefore it was thereupon enacted that lands not 'entered' within 18 months next thereafter should be forfeited. This act was molded and remolded in varying form, and finally for the time being repealed February 9, 1814."

Fay *v.* Crozer, 156 Fed., 492–3.

This statement of the law is supported by the text writer cited by the Court (Hutchinson's Land Titles in Virginia and West Virginia, pp. 2–8).

So too the Court of Appeals of West Virginia in reviewing the early tax Laws of Virginia, states "Acts were passed forfeiting lands not entered on the land books. Acts of Feb'y 5, 1810, and Feb'y 27, 1835" (State *v.* Sponaugle, 45 W. Va., 415; 32 S. E., 283, 285).

Again in a very recent case the Supreme Court of Appeals of West Virginia says, "The first Act declaring forfeitures for non-entry was passed on the 27th day of February, 1835" (1908, State *vs.* West Branch Lumber Co., 63 S. E., at p. 377.)

The references in the above cited work of Hutchinson are to the Revised Code of Virginia, published in 1819 by Mr. Leigh pursuant to the direction of the General Assembly of Virginia, in which all the laws of Virginia concerning forfeitures and sales of lands for taxes from the origin of the Commonwealth to the year 1819 are published in full (Va. Rev. Code, 1819, Vol. 2, Appendix IV, pp. 508–561).

The text of these statutes confirms entirely the statements of Hutchinson and show very clearly that no forfeiture of any kind was permitted by Virginia prior to the Act of November 4, 1792 (Rev. Code, Va., 1819, Vol. 2, p. 524), and that this Act related only to delinquency in payment of taxes that *had been assessed*, and *not to failure to list* or enter lands on the books for taxation, and that even in case of taxes that had been assessed a forfeiture was possible only if the Sheriff had made a proper return and the treasurer had published a notice stating "the

names of the delinquents, with the quantity of land and the *taxes due* thereon" (see the Va. Act of December 19, 1794, Section 4, explaining the meaning of the Act of 1792, Rev. Code, Va., 1819, Vol. 2, p. 526). These Virginia acts, as published in the Revised Code of Va. of 1819, also show how the time to redeem from sales and the time to comply with the requirements to list were extended from time to time, and how acts attempting to forfeit for failure to enter the land on the books for taxation were repealed and all forfeitures therefor were released.

The text of the last mentioned provision is as follows:

"52. BE IT FURTHER ENACTED that the act entitled An Act concerning taxes on lands, passed the———day of ————, Eighteen hundred and twelve, [and] all other acts declaring lands to be forfeited for failure to enter on the commissioner's books; and all acts and parts of acts coming within the purview of this act shall be and the same hereby are repealed. And all forfeitures of lands for failure to enter on the commissioner's book shall be and the same are hereby remitted."

"An Act to amend and explain the act entitled An Act concerning taxes on land." Passed February 9, 1814; Rev. Code, Va., 1819; Vol. 2, p. 555, Section 52.

It was not to be expected that the Court of Appeals of Kentucky should be familiar with the ancient tax laws of Virginia. But it seems deplorable that the Court did not correct its mistakes in statements of facts respecting those laws of Virginia after the same had been pointed out in the petition for reargument (Case No. 223, fols. 224–227). The (mistaken) statement of Virginia law as it existed at the time of the separation of Kentucky seems to have been part of the foundation of the Court's conclusion that the Virginia Compact did not prevent the enactment of this Article III.

Such then were the laws of Virginia on the 18th day of December, 1789; *forfeiture for any cause whatever was positively prohibited.* The penalty for failure to list was a small fine and treble tax. The penalty for failure to pay taxes actually assessed was a sale of so much of the land needed to pay the tax and costs. These statutes have been cited here for the information of the Court although the plaintiff in error is not required to prove a negative to prevent a confiscation of its property. If

there were any such laws of Virginia on December 18, 1789, it would have been the part of the Commonwealth of Kentucky to show them as a justification for the attempted forfeiture.

The laws of Virginia enacted after December 18, 1789, are irrelevant in construing the Compact which speaks as of its date. The Act of Congress based upon and giving effect to the Compact expressly says that Kentucky is admitted into the Union "*according to its boundaries on the 18th day of December, 1789,*" (the date of the Compact) and all the decisions of this Court and those of Kentucky that have referred to the laws referred to in the Compact refer to the laws of Virginia existing at its date.

But it is interesting to notice that no laws forfeiting for failure to list were enforced in Virginia until *nearly half a century after* the date of the Compact.

"The Virginia Act of 1790 (13 Hening, 116) although later than the date of the Compact did not forfeit for failure to enter on Commissioners book but only for failure to pay taxes *assessed* for 3 years with an exemption of those under disability. The earliest Act forfeiting for failure to *enter on the books* was the Virginia Act of February 5, 1810; but the time to redeem thereunder was extended by later acts till the Act of February 9, 1814, which repealed all acts forfeiting title for failure to enter on tax books and *remitted all forfeitures* for that cause."

Hutchinson Land Titles of Va. & W. Va., pp. 5, 6 and 7.

The opinion in State *v.* Sponagle (45 W. Va., 415; 32 S. E., 283, at p. 285) in giving a list of these statutes omits to state the above mentioned extension and repeal.

> "Prior to the passage of the law of 1835 providing for the entry of lands on the Commissioner's books and forfeiting all lands not so entered there was no law in force (in Virginia) declaring a forfeiture of such omitted lands."
>
> 1858, Hale *v.* Marshall, 14 Grat. (Va.), 289.

> "Under the Virginia statute of 1790 providing that a failure to pay taxes should forfeit the land before any forfeiture could occur the land must be *assessed*, listed, returned to the auditor of public accounts and advertised."
>
> Kinney *v.* Beverly, 2 Hen. & M. Va., 318.

In 1821 the law of Virginia was that an owner neglecting to enter land with the Commissioner was liable merely to a penalty of 25 per cent. per annum on the amount of the taxes. Washington *v.* Commonwealth, 2 Va. Cas., 258.

The Court of Appeals seems to have been misinformed upon this point, and hence to have confused forfeitures for failure to pay taxes and forfeiture for failure to list (Record, No. 223, fol. 163). The error was pointed out in the petition for Rehearing (*Id.*, fols. 224–226), but without avail.

The Virginia Act of 1835 provided that grants from the State would be forfeited on July 1, 1836, unless entered before that time on the Commissioner's books and all arrears paid. By acts of March 23, 1836, March 30, 1837 and March 15, 1838, the time of redemption was in each case extended.

Bowman *v.* Dewing, 37 W. V., 117 (16 S. E., 440).

The statutory law to-day in Virginia seems to be as follows:

"Any person owning or claiming real estate in this State shall, if the same be not already there, cause it to be entered on the land books."

Va. Acts 1874, p. 386; Va. Code (Pollard, 1904), Sec. 634.

"If such owner or claimant shall neglect to enter his real estate as provided by the preceding section for a period of five years after notice in writing by a commissioner authorized to assess the same, such real estate shall be absolutely forfeited to the Commonwealth and be liable to entry and survey as waste and unappropriated lands under Chapter 104."

Va. Acts 1874, p. 386, now in Va. Code (Pollard, 1904) Section 635.

The last cited section in above cited edition of the Code has the following note, which would seem to indicate the position of the bar of Virginia:

"This statute is constitutional (Wilds Lessee *v.* Serpell, 10 Grat., 405). But see King *vs.* Mullins, 171 U. S., 404 (18 Sup. Ct., 925, 43 L. ed., 214). For comments on same see 4 Va. Law Reg., 194, where it is observed

that the reasoning in the last mentioned case would lead to the conclusion that this section is unconstitutional.

Va. Code (Pollard) 1904, at p. 311.

(*d*) Because at the date of the Compact there was no law requiring the owner to list and pay taxes on land when the land was listed and tax paid by another claimant.

Again the plaintiff in error is not required to prove this negative to save itself from ruin. The burden is on the Commonwealth to show the existence of such a vicious law in Virginia in 1789, and may be safely challenged to do so.

(*e*) The Opinion of this Court in King *vs.* Mullins calls for a decision declaring Article III of the Kentucky Act of 1906 void under the Compact with Virginia and the National Constitution.

It is respectfully submitted that this Court in the Opinion in King *vs.* Mullins, construing the Constitution and Statutes of West Virginia then before the Court, has already shown on the very face of the Opinion the reasons why the Statute of Kentucky now before the Court must be held void as a plain violation of the Compact of 1789 between Virginia and Kentucky, and hence of the National Constitution which forbids its violation by the State.

For in King *vs.* Mullins, this Court quotes from the Constitution of West Virginia exactly the same provision as in the Virginia-Kentucky Compact, viz.:

> "That all private rights and interests in lands in that State (*i. e.*, West Virginia) derived from or under the laws of Virginia . . . shall remain valid and secure and shall be determined by the laws in force in Virginia prior to the formation of this State" (*i. e.*, West Virginia) (171 U. S., at p. 410).

And thereupon says:

> "In view of this provision it is proper to look at the legislation of Virginia and the decisions of its highest Court touching the forfeiture of lands for non-compliance by the owners with the requirements of the law relating to taxation" (*Id.*, *Ib.*).

The same thing it is submitted is to be done in the cases at bar except that the law of Virginia at the date of the Compact, December 18, 1789 (instead of at the date of the Constitution of Virginia in 1863), is to be now ascertained and enforced.

And in the review in King *vs.* Mullins of the law of Virginia relating to forfeitures under the tax laws beginning with the Virginia Statute of 1835, this Court states that the Virginia Supreme Court of Appeals in Martin *v.* Snowden (18 Gratt., 100, 139) held "*that for-*
"*feiture of the land assessed with the tax was not then*
"(*i. e., at the adoption of the National Constitution*), *in*
"*use either in England or the States as a mode of*
"*collecting the tax*" (171 U. S., p. 415); and a little farther on this Court quotes from the same Opinion of the Supreme Court of Appeals of Virginia the statement that "*the forfeiture of lands to the Crown does not appear to have been a means recognized and employed in England at any period of its history for enforcing the payment of taxes or other debts to the Crown*" (*Id., Ib.*), and before concluding its review this Court quotes from the same Opinion the summing up of its review on this point of the Court of Appeals of Virginia: "Looking at the spirit which animated all this legislation we cannot doubt as to what would have been thought at that day (*i. e.*, of the adoption of the National Constitution in 1789) of a statute declaring an immediate and absolute forfeiture of the whole land as a penalty for the non-payment of a tax within sixty days after assessment of it, without notice to the owner, by advertisement or otherwise of the assessment, and without any, even the least, effort to collect it" (171 U. S., at p. 416).

What then would have been thought in the year 1789 of an attempted forfeiture not for non-payment of taxes assessed, but for an alleged failure to list for taxes not due, and where instead of an absence of least effort to collect there was, as already shown, a positive refusal to permit the listing or to accept taxes offered which were not due?

So, too, it appears from the Opinion in King *vs.* Mul-

lins, the above cited provision of the Constitution of that State requiring rights and interests to be determined by the laws in force in Virginia prior to the formation of West Virginia thereby required such rights and interests to be determined according to the Virginia forfeiture Statute of 1835 and its amendments and supplements. But in Kentucky the Compact with Virginia was incorporated in the first Constitution of Kentucky and in later Constitutions, and although omitted from the existing Constitution of that State is, as the Court of Appeals in its Opinion in the case now at bar (quoting authorities cited by plaintiff in error in a brief then before the Court) has rightly said, "*as obligatory upon this State to its fair intent as fully as if ingrafted in the Constitution of the State. Nay, more so, in that while the State might alter or abrogate provisions of its own Constitution, it is without power to either alter or ignore the compact* (*Green v. Biddle, 8 Wheat. I, Lessee of Marlatt v. Silk, 11 Pet., 1; Poindexter v. Greenhow, 114 U. S., 271*)" (Opinion of Court of Appeals, Record No. 223, fols. 175–176).

Hence it appears that while the provision in the Constitution of West Virginia required "the rights and interests" in West Virginia land to be determined by the forfeiture Statute of Virginia of 1835 and its supplements as they existed in 1863, the similar provisions in the Compact between Kentucky and Virginia require that similar "rights and interests" in Kentucky lands should be determined by the laws of Virginia as they existed in 1789 when such forfeitures were unknown or probably abhorred, as the legislature of Virginia declared as late as 1783 "forfeiture of lands in case of non-payment, which is unreasonable . . . shall hereafter cease" (11 Hennings Stat., 347).

It would seem therefore that the case in this Court upon which the instigators of Article III have been avowedly basing their contentions in support of this Kentucky legislation must be a cause of their undoing, and is one of the decisions of this Court whose neces-

sary implications most call for the annulling of that legislation.

It is conceded now, and was conceded by the plaintiff in Green *v.* Biddle, that the Compact does not prevent Kentucky from taxing the lands and selling them for non-payment of taxes, to regulate the course of descents and liability of real estate for the payment of debts and to change the remedies in the Courts and forms of actions, the *period* of limitation and the mode of execution, provided *these changes are not unjustly retroactive.* (8 Wheat., 64-65). But as also claimed by the plaintiff in that case (a claim sustained by the Supreme Court of the United States), the Compact "does prevent her from confiscating the property" (8 Wheat., 63). In Green *v.* Biddle the attempted confiscation was indirect and of a part only of the property, to wit, by requiring the owner to bear the cost of improvements made by an adverse occupant. This, which the Supreme Court held could not be done, was less of a confiscation than the more recently proposed attempts to confiscate the whole title, and by extending the doctrine of "color of title" to extend the pretended possession of an adverse occupant beyond his enclosure in a way not permitted by the laws existing in Virginia, December 18, 1789, or by "outlawing" the titles under the pretense of forfeiture for alleged failure to list for taxation.

The Compact is invoked in the cases now at bar not to restrict any of the powers to which a Commonwealth of the Union is justly or fairly entitled, but to prevent a plan of confiscation which, when presented in a much less objectionable form, this Court seems to have permitted with hesitation and reluctance when to declare it void it was believed would have disturbed the titles of two States by subverting what had in that case been long acquiesced in but had originated after the separation of Kentucky.

This is not an effort to make Kentucky a "vassal" to Virginia, or otherwise than as every man of honor is a vassal to the obligations of his plighted word. Nor is the "sovereignty" of Kentucky involved; for a paraphrase of the words of this Court in the case of The Kansas In-

dians (5 Wall., 737), quoted and approved in Stearns *v.* Minnesota, 179 U. S., 223, 249 (*supra*, p. 145), applies:

"*There can be no question of State sovereignty in the case, as [Kentucky] accepted her admission into the family of States on condition* that the rights [under Virginia grants] should remain unimpaired."

And elsewhere this Court has said:

"The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected sovereign power, on whose Legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire; she is a member of the American Union; and that Union has a constitution, the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several States, which none claim a right to pass" (Chief Justice Marshall in Fletcher *v.* Peck, 6 Cranch, 87, 136).

In Stearns *v.* Minnesota, Mr. Justice Brewer, for the Court, after reviewing many decisions of the State Court, and the enabling Act of Congress and the State Constitution adopted thereunder, says:

"That these provisions of the enabling act and the Constitution, in form at least, made *a compact* between the United States and the state is evident. In an inquiry as to the validity of such a compact this distinction must at the outset be noticed. There may be agreements or compacts attempted to be entered into between two States, or between a state and the nation, in reference to political rights and obligations, and there may be those solely in reference to property belonging to one or the other. That different considerations may underlie the question as to the validity of these two kinds of compacts or agreements is obvious.

"It has often been said that a state admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations; whereas, *on the other hand, a mere agreement in reference to property involves no question of equality of status, but only of the power of a state to deal with the*

nation or with any other state in reference to such property. The case before us is one involving simply an agreement as to property between a state and the nation."

"Under the provisions of the treaty of 1854, between the Shawnee Indians residing within the territory of Kansas and the United States, certain of their lands were allotted to individual members and patented to them, with the express restriction that "the said lands shall never be sold by the grantee, or his heirs, without the consent of the Secretary of the Interior." In the case of the Kansas Indians, 5 Wall, 737, 757, *sub nom.* Blue Jacket *v.* Johnson County Comrs., 18 L. ed., 657, this Court, holding a law of the State of Kansas subjecting these lands to taxation invalid, said:

"'*There can be no question of state sovereignty in the case, as Kansas accepted her admission into the family of states on condition that the Indians' rights should remain unimpaired,* and the general government at liberty to make any regulation respecting them, their lands, property, or other rights, which it would have been competent to make if Kansas had not been admitted into the Union. . . . While the general government has a superintending care over their interests, and continues to treat with them as a nation, the State of Kansas is estopped from denying their title to it. *She accepted this status when she accepted the act admitting* her into the Union.' See also Beecher *v.* Wetherby, 95 U. S., 517, 523."

Stearns *v.* Minnesota, 179 U. S., 243, 249.

III.

The same Article III violates Section 10 of Article I of the Constitution of the United States which provides that no State shall pass any law impairing the obligation of contracts.

"There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, and it is one of the highest duties of this Court to take care that the prohibition shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit."

Mr. Justice Strong
in Murray v. Charleston, 96 U. S., 448.

The petition for rehearing refers to this objection as insisted upon in the brief previously submitted to the Court of Appeals (Record 223, fols. 261, 262); and it was again made in the amended answer of the plaintiff in error (Record No. 224, fol. 244) in the same words as it afterwards appeared in the assignments of error on the petition for writ of error from this Court (*Id.*, fol. 347).

It is contended on behalf of plaintiff in error, that Article III, as construed by the Court below, and the proceedings thereunder, are void under this section of the National Constitution.

(*a*) *Because the same impair the obligation of the Compact* (*supra*, pp. 154–174).

(*b*) *Because the same impair the obligation of the original grants* of the land, by enforcing as a condition subsequent of an executed and complete grant a forfeiture which under the laws of Virginia at the time of the execution of the grants was prohibited by law, because at the time these grants were made by Virginia to the ancestors in title of the plaintiff in error there was not in the laws of Virginia and never had been under the common law of England any right of the State to forfeit an executed grant for any cause not stated in the grant itself, to be a condition *subsequent* (*supra*, pp. 164, 171, 261). Conditions *precedent*, if any, such as non-payment of instalment of purchase money, or failure to improve the lands preceded the vesting of the title and generally did not survive the execution of the grant and any conditions subsequent for such forfeiture could not exist unless either expressly stated in the grant or so stated by implication because contained in the statutes then in force and by whose authority the grant was made.

The distinction between conditions precedent and subsequent on the questions of forfeiture or abandonment are stated by this Court in Glenn *vs.* United States, 13 How., 250, at p, 257, in distinguishing the case then at bar from the case of Arredendo (6 Pet., 711).

But conditions subsequent may be stated in a grant.

The condition of forfeiture is not even a condition subsequent as it was neither stated in the grant nor known to the law when the grant was made (*infra*, p. 212).

One of the "anomalies" of these forfeiting acts is that they disregard the ages-old distinction between conditions precedent and conditions subsequent, and inject into these grants a condition subsequent which was not there, which is done on the plea that the State's need of revenue so require, whereas it is clear that the real reason is that the officials of the State want to avoid the first grants in order to make room, in West Virginia for later grants by the State of the same land, and in Kentucky for no grants at all but "claims" derived "from any source whatsoever." In West Virginia a palliation may be found in the confusion of the early times when both the first and the second or later grants were made; but in the cases at bar for Kentucky lands there is no such shadow of excuse. The attempt is to exterminate or transfer the titles that passed by the grants under which the plaintiff in error claims, in order to make place for claims that are not based on any true grants, but bogus documents issued by Kentucky officials in the teeth of the prohibitions of the Statute under which those officials purported to be acting (*infra*, p. 294) and in direct violation of the provisions of the Compact that prevented any grants by Kentucky that should interfere with those made by Virginia.

(c) *Because the same impair the obligation of the agreements to purchase and deeds to the plaintiff* in error which were made and received on the faith that the laws of Kentucky regarding the rights of those claiming lands in Kentucky under patents from Virginia were such as the Court of Appeals of Kentucky had declared them to be in many cases during a century prior to the enactment of Article III.

Instances of changes of the rules of decision in order to effect the "outlawing" of these titles, are, it is respectfully submitted, shown throughout this brief, including almost all of those which are hereinafter pointed out as denials of equal protection of the laws (*infra*, p. 246).

(1) Grants from the State are protected as much as grants from individuals.

Fletcher *v.* Peck, 6 Cranch, 187.
Green *v.* Biddle, 8 Wheat., 1.
New Jersey *v.* Wilson, 7 Cranch, 164, 166.
Wolff *v.* New Orleans, 103 U. S., 358, 367.
Davis *v.* Gray, 16 Wall., 203.
Louisiana *v.* Jumel, 107 U. S., 750.
United States *v.* Mayor, 103 U. S., 358.
Banks *v.* Billings, 4 Pet., 514, 560.
Woodruff *v.* Trapnall, 10 How., 190, 207.
Poindexter *v.* Greenhow, 114 U. S., 271, 297.
Charles River Bridge *v.* Warren Bridge, 11 Pet., 617.
Legal Tender Cases, 12 Wall., 581.
Chicago, etc., R. Co. *v.* Chicago, 166 U. S., 237.
Stearns *v.* Minnesota, 179 U. S., 223, 233, 245-6, 249, 254, 259, 262.
New Orleans Gas L. Co. *v.* Louisiana Light, etc., Co., 115 U. S., 650, 672,
Terrett *v.* Taylor, 9 Cranch, 43.
Town of Pawlet *v.* Clark, 9 Cranch, 292.
Farrington *v.* Tennessee, 95 U. S., 104.
Mechanics Bank v. Thomas, 18 How., 384.

So, too, says the Court of Appeals of Kentucky.

The State by this clause of the Constitution is forbidden to impair its own contracts.

Franklin Co. Ct. *v.* Deposit Bank, 87 Ky., 370; 10 Ky. L. Rep'r, 506; 95 S. W., 212.
Baldwin *v.* Commonwealth, 74 Ky., 417, 432-3.

Even Congress has no power to authorize a State to impair the obligation of contracts.

Homestead Cases, 22 Grat. (Va.), 266.

(2) This Court will determine independently of the State Courts whether there is a contract and whether it has been impaired.

In Stearns v. Minnesota, this Court, Mr. Justice Brewer writing the opinion, said:

"In Douglas *v.* Kentucky, 168 U. S., 488, this question was considered at length, and, by Mr. Justice Har-

lan, after a review of some prior cases, the conclusion was thus stated:

"The doctrine that this Court possesses paramount authority when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause in the Constitution, to determine for itself the existence or non-existence of the contract set up, and whether its obligation has been impaired by the state enactment, has been affirmed in numerous other cases."

Stearns *v.* Minnesota, 179 U. S., at p. 233, reversing 72 Minn., 200; 75 S. W., 210, and citing:
Ohio Life, etc., Co. *v.* Debolt, 16 How., 416, 452.
Wright *v.* Nagle, 101 U. S., 791, 794.
Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S., 683.
Vicksburg, etc., R. Co. *v.* Dennis, 116 U. S., 665, 667.
New Orleans, etc., Co. *v.* Louisiana S. Ref. Co., 125 U. S., 18, 36.
Bryam *v.* Kentucky Conf. M. E. Church, 151 U. S., 639.
Mobile & O. R. Co. *v.* Tennessee, 153 U. S., 486, 493.
Bacon *v.* Texas, 163 U. S., 207, 219.
McCullough *v.* Virginia, 172 U. S., 102, 109.
Walsh *v.* Columbus, etc., R. Co., 176 U. S., 469.

The same doctrine has always been declared.
Sullivan *v.* Texas, 207 U. S., 423; citing also
Jefferson Branch Bank *v.* Skelly, 1 Black, 436, 443.
Houston, etc., R. Co. *v.* Texas, 177 U. S., 66, 77.
St. Paul Gaslight Co. *v.* St. Paul, 181 U. S., 142, 147.
Muhlker *v.* New York & H. R. Co., 197 U. S., 544, 570.
Butz *v.* Muscatine, 8 Wall., 575.
Rowan *v.* Runnels, 46 U. S., 134.
Cowen *v.* Wright, 117 U. S., 648, 656.
Bank of Ohio *v.* Knoop, 57 U. S., 369.
Yazoo & M. V. R. Co. *v.* Thomas, 132 U. S., 174, 184.

And in Wilmington & W. R. Co. *v.* Alsbrook, 146 U. S., 279, 293, Mr. Chief Justice Fuller speaking for this Court, said:

"In arriving at its conclusions, however, the State court gave effect to the revenue law of 1891, and held that the contract did not confer the right of exemption from its operation. If it did its obligation was impaired by the subsequent law and as the inquiry whether it

did not was necessarily directly passed upon, we are of opinion that the writ of error was properly allowed."

(3) The laws existing when and where a contract is made form a part of it, and cannot be changed so as to impair it.

"It is also the settled doctrine of this Court that the the laws which subsist at the time and places of making a contract *form a part of it, as if they were expressly referred to in its terms.*"

Edwards *v.* Kearzey, 96 U. S. 595.
S. P. McGahey *v.* Virginia, 135 U. S., 662.
Bronson *v.* Kinzie, 1 How., 311.
Woodruff *v.* Trapnall, 10 How., 190.
Furman *v.* Nichol, 8 Wall., 44.
Walker *v.* Whitehead, 16 Wall., 314, 317.
Von Hoffman *v.* Quincy, 4 Wall., 535.
Tennessee *v.* Sneed, 96 U. S., 69.
Memphis *v.* United States, 97 U. S., 293.
Memphis *v.* Brown, 97 U. S., 300.
Howard *v.* Bugbee, 24 How., 461.

The Court of Appeals of Kentucky has over and over again held the same.

"The current of authority establishes, without serious conflict as we conceive, . . . *that the laws in force, when and where the contract may be made,* form a part of it" (Collins *v.* Collins, 79 Ky., 91-92 (citing Von Hoffman *v.* City of Quincy, 4 Wall., 535, and Green *v.* Biddle, 8 Wheat., 1); S. P. Blair *v.* Williams, 14 Ky. (4 Litt.), 35; Lapsley *v.* Brashers (*Id.*, 47); McKinney *v.* Carroll, 21 Ky. (5 Mon.), 96; Grayson *v.* Lilley, 23 *Id.* (7 Mon.), 6; Griswold *v.* Hepburn, 63 *Id.* (2 Duv.), 20; Louisville, etc., Co. *v.* Boss., 19 Ky. L. R., 1954; 44 S. W., 981).

(4) The decision of the State Court construing statutes will not be allowed by this Court to impair the obligation of contracts.

Ohio Life & T. Co. *v.* Debolt, 16 How., 432.
Gelpcke *v.* Dubuque, 1 Wall., 175.
Jefferson Branch Bank *v.* Skelly, 1 Black., 436.
New Jersey *v.* Yard, 95 U. S., 104.
Memphis & C. R. R. *v.* Gaines, 97 U. S., 697.
University *v.* People, 99 U. S., 309.

Louisv. & N. R. R. *v.* Palmes, 109 U. S., 244.
Memphis Gas Co. *v.* Shelby County, 109 U. S., 398.
Vicksburg, etc., R. R. *v.* Dennis, 116 U. S., 665.
Gray, Limitation of Taxing Power, p. 488.

(5) A change of judicial construction of statutes will not be permitted to impair prior contracts.

"The true rule is to give to a change of judicial construction in respect to a statute the same effect in *its operation on contracts and existing contract rights that would be given to a legislative amendment;* that is *to say, make it prospective*, but not retroactive."

Douglas *v.* Pike County, 101 U. S., 677, 686, quoting from Rowan *v.* Runnels, 5 How., 134, 139; Ohio Co. *v.* Debolt, 16 How., 416; Supervisors *v.* U. S., 16 Wall., 71; Fairfield *v.* Gallatin Co., 101 U. S., 544.

"We have always followed the highest court of the State in its construction of its own constitution and laws. It is only where they have been construed differently at different times that, in cases like this, we have adopted as a rule of action the first decision and rejected the last. This has been done on the ground that rights acquired by the strength of the former decision *ought not be lost by a change of opinion* in the court. (Elwood *v.* Marcy, 92 U. S., 289, followed in Anderson *v.* Santa Anna, 116 U. S., 364):

"When the highest court of a state has given different constructions to its Constitution and laws at different times and rights have been acquired under the former construction, we have followed that and disregarded the latter." (Fairfield *v.* Gallatin Co., 100 U. S., 47).

"This Court treats the construction given to a statute by highest Court of a State as part of the statute, *except when it will invalidate prior contracts.* A subsequent change in decision can affect only subsequent contracts." (Weightman *v.* Clark, 103 U. S., 256; Louisiana *v.* Pillsbury, 105 U. S., 278).

"If a contract when made was valid by the Constitution and laws of the State *as then expounded* by highest State authorities, no subsequent action by State Legislature or judiciary can impair its obligations."

Havemeyer *v.* Iowa Co., 3 Wall, 294; S. P. Fletcher *v.* Peck, 6 Cranch, 87.

"A Contract authorized by the existing State Constitution *as then construed* by the highest Court of the

State cannot be affected by subsequent change in the decisions of that court, or by the adoption of a new constitution." City of Los Angeles *v.* Los Angeles City Water Co., 77 U. S, 558.

"If a contract when made was valid under the Constitution and laws of a State, *as they had been previously expounded* by its judicial tribunals and as they were understood at the time, no subsequent action by the Legislature or the judiciary will be regarded by this Court as establishing its invalidity" (Syllabus, Olcott *v.* Supervisors of Fond du Lac County, 83 U. S., 678).

"A contract valid by Constitution and laws of a State, as expounded by the highest authorities when contract was made, *cannot be impaired by later action* of Legislature *or judiciary* (Havemeyer *v.* Iowa County, 3 Wall, 294; Thompson *v.* Lee County, *Id.*, p. 327).

"A decision by the highest Court of a State, enforcing a subsequent statute or ordinance and holding void a law which the highest court of the State had previously held valid, is likewise an impairment of the obligation of contracts created by and under the prior Act (Gray Limitation of Taxing Power, p. 523)."

Where the highest court of a State has decided that an owner of lands has certain rights resting on contract, a purchaser after such decision is entitled to the benefit of his contract as thus interpreted, and a subsequent change in decision which denies such benefit impairs the obligation of his contract.

Muhlker *v.* New York & H. R. Co., 197 U. S., 544;
Birrell *v.* N. Y. & H. R. Co., 198 U. S., 390.

In Sauer *v.* New York, Mr. Justice Moody, for this Court, said:

"The plaintiff asserts that the case of Story *v.* New York Elev. R. Co., 90 N. Y., 122; 43 Am. Rep., 146, decided in 1882, four years before he acquired title to the property, interpreted the contract between the City of New York and the owners of land abutting upon its streets as assuring the owner easements of access, light and air, which could not lawfully be impaired by the erection on the street of an elevated structure designed for public travel; that he is entitled to the benefit of his contract *as thus interpreted*, and that the judgment of the Court denying him its benefits impaired its obligation.

"If the facts upon which this claim is based are accurately stated, then the case comes within the authority

of Muhlker *v.* New York & H. R. Co., 197 U. S., 544, which holds that, when the Court of Appeals has once interpreted the contract existing between the landowner and the city, *that interpretation becomes a part of the contract*, upon which one acquiring land may rely, and that any subsequent change of it to his injury impairs the obligation of the contract" (206 U. S., 535).

Burgess *v.* Seligman, 107 U. S., 20, holds:

"When contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision of the State tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued."

In Hoffman *v.* Quincy, 4 Wall., 535, 548, Mr. Justice Swain said:

"It is also settled that the laws which subsisted at the time and place of making a contract, and where it is to be performed, enter into and form a part of it as if they were expressly referred to or incorporated in its terms." "We ought not to give them [*decisions of State Courts*] *a retroactive effect* and allow them to render invalid contracts entered into with citizens of other States, which in the judgment of this Court were lawfully made (Groves *v.* Slaughter, 15 Pet., 449; Carroll County *v.* Smith, 111 U. S., 562)."

And Mr. Chief Justice Taney, in Ohio Life Insurance & Trust Co. *v.* Debolt, 16 How., 432, said:

"Indeed the duty imposed upon this Court to enforce contracts honestly and legally made would be vain and nugatory if we were bound to follow these changes in judicial decisions which lapse of time and change in judicial offices will often produce. The writ of error to a state court would be no protection to a contract if we were bound to follow the judgment which the State court had given, and which the writ of error brings up for the revision here." Citing cases. "These cases thoroughly establish the proposition that in no way can obligation of the Federal courts, under the Constitution, be discharged than by rigidly adhering to the right and duty to maintain the ultimate right of the Federal courts to protect the citizens of the United States, and of every state in which enjoyment of rights and privileges are guaranteed by the Federal Constitution."

In the opinion of this Court, speaking by Mr. Justice Harlan in a very recent case, the rules for cases of which the Federal Courts have jurisdiction are summarized as follows, after reviewing and citing many authorities:

"We take it, then, that it is no longer to be questioned that the Federal Courts, in determining cases before them, are to be guided by the following rules: 1. When administering state laws and determining rights accruing under those laws, the jurisdiction of the Federal Court is an independent one, not subordinate to, but co-ordinate and concurrent with, the jurisdiction of the state courts. 2. Where, *before the rights of the parties accrued*, certain rules relating to real estates have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the Federal Court as authoritative declarations of the law of the state. 3. *But where the law of the state has not been thus settled*, it is not only the right, but the duty, of the Federal Court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence. 4. So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decision, or *when there has been no decision by the state court on the particular question involved*, then the Federal Courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the Federal Court should always lean to an agreement with the state court if the question is balanced with doubt.

"The Court took care, in Burgess *v.* Seligman, to say that the Federal Court would not only fail in its duty, but would defeat the object for which the national Courts were given jurisdiction of controversies between citizens of different States, if, while leaning to an agreement with the State court, it did not exercise an independent judgment in cases involving principles not settled by previous adjudications."

Kuhn *v.* Fairmont Coal Co., October Term, 1909, where the Court cites among other cases Russell *v.* Southard, 12 How., 139, 147, where this Court refused to follow the Court of Appeals of Kentucky regarding the rules of evidence to determine the effect of a deed, and Yates *v.* Mil-

waukee, 10 Wall., 497, 506; and Louisville Trust Co. *v.* Cincinnati, 22 C. C. A., 334, 338, 341, 47 U. S. App., 36, 45, 51, 76, Fed., 296, 300, 304, where Mr. Justice Lurton, then Judge Lurton,

> " speaking for all the members of that Court, made an extended review of the authorities, and observed that if the State decision was regarded as conclusive upon the parties, ' the constitutional right of the complainant, as a citizen of a State other than Ohio, to have its rights as a mortgagee defined and adjudged by a court of the United States, is of no real value. If this Court cannot for itself examine these street contracts and determine their validity, effect and duration, and must follow the interpretation and construction placed on them by another court in a suit begun *after its rights as mortgagee had accrued, and to which it was not a party*, then the right of such a mortgagee to have a hearing before judgment and a trial before execution is a matter of form without substance.' "

Where parties have entered into a contract, valid at the time by the laws of the State, it is not competent for the courts of the State to impair the obligation of that contract (City of Chicago *v.* Sheldon, 9 Wall., 50).

The judicial construction of a State constitution enters into the contract contained in bonds issued in accordance therewith, and hence cannot be subsequently altered so as to impair the obligation of such bonds (Louisiana *v.* Pillsbury, 105 U. S., 278).

There is no difference in principle between a law that impairs the obligation of a contract in terms and one that produces the same effect *in the construction and practical execution of it* (Ches. & O. Canal Co. *v.* Balto. & O. R. Co., 4 Gill. & J. (Md.) p. 1).

> " The State can no more impair *through her judiciary* her own contract that she can impair the obligation of the same contract through her Legislature."
>
> Canal Co.'s Case, 83 Md., 826, 35 Atl., 365.

Where a contract *when made* is valid *by the laws of the State as then expounded* by the departments of government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent constitutional ordinance or act of the Legislature *or decision of its courts* altering the construction of the law. State *v.* Miller, 50 Mo., 129.

"Where a Constitution or statute has received a construction by the courts of last resort, and contracts have been made and rights acquired in accordance therewith, such contracts may not be invalidated, nor vested rights acquired under them impaired *by a change of construction made by a subsequent decision*, notwithstanding the general rule that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its opinion." Mason *v.* Nelson (N. Car., 1908), 62 S. E., 625.

"Federal courts, in determining the rights of parties acquired under a State statute *prior to the date of a change of opinion* by the Supreme Court of the State as to its construction, will exercise their own independent judgment, and are not bound to follow the latest decision of the state court." Forest Products Co. *v.* Russell, 161 Fed., 1004.

In the last cited case the Court, after citing other cases, said:

"I think the rule is uniform that a federal court, in interpreting the rights of parties under transactions made prior to the date of the change of opinion of the Supreme Court of the state, will exercise its own independent judgment, and follow its own decisions made prior to such change. Rowan *v.* Runnels, 5 How., 134; Carroll County *v.* Smith, 111 U. S., 562." 161 Fed., at p. 1007.

Even where the decisions of the State courts have been so consistent and long persistent as to become a rule of property the Supreme Tribunal will overrule them if contrary to a compact or treaty.

In a case relating to lands in Michigan this Court, by Mr. Justice Harlan, said:

"That the rule of property should not be disturbed, *unless it clearly involves a misinterpretation of the words of the treaty of 1819.*"

Francis *v.* Francis, 203 U. S., 223, 242.

Even when a change of judicial decision is not sufficient, of itself alone, to give this Court jurisdiction, yet, if *jurisdiction of the cause has been acquired on other grounds*, this Court is not bound to follow the later decision of the State court, and will hold the litigant parties to the rights and obligations which accord with justice.

Ohio L. Ins. Co. *v.* Debolt, 16 How., 416;

Gelpcke *v.* Dubuque, 1 Wall., 175;

Havemeyer *v.* Iowa Co., 3 Wall., 295;
Lee County *v.* Rogers, 7 Wall., 181;
Kenosha *v.* Lamson, 9 Wall., 477;
Olcott *v.* Fond du Lac Co., 16 Wall., 678;
Douglass *v.* Pike County, 101 U. S., 677;
Weightman *v.* Clark, 103 U. S., 256;
Taylor *v.* Ypsilanti, 105 U. S., 278;
Burgess *v.* Seligman, 107 U. S., 20;
Anderson *v.* Santa Anna, 116 U. S., 356;
German Sav. Bk. *v.* Franklin County, 128 U. S., 526;
Folsom *v.* Township Ninety-Six, 159 U. S., 611.

In Pease *v.* Peck, 18 How., 595, this Court said:

"When the decisions of the state court are not consistent we do not feel bound to follow the last, if it is contrary to our own convictions; and much more is this the case where, after a long course of consistent decisions, some new light suddenly springs up, or *an excited public opinion has elicited new doctrines*, subversive of former safe precedent. Cases may exist, also, when a cause is got up in a state court for the very purpose of anticipating our decision of a question known to be pending in this court. Nor do we feel bound in any case in which a point is first raised in the courts of the United States, and has been decided in a Circuit Court, to reverse that decision contrary to our own convictions, in order to conform to a state decision made in the meantime. Such decisions have not the character of established precedent declarative of the settled law of a state."

Cited and followed in 1908, Murray *v.* Wilson, etc., Co., 164 Fed., 1, at page 25.

IV.

The same Article III violates the Fourteenth Amendment of the Constitution of the United States, which provides that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

"Irrespective of the invalidity of said Article III this suit violates the aforesaid Sections, Articles and Amendments of the Constitution of the United States, because this defendant has complied with any and all (if any) of the provisions of said Revenue Act that are valid, so far as the same are applicable to this defendant, if any of said provisions are so valid; and this defendant has been guilty of no wrong, and has not done or omitted to do any act which would forfeit this defendant's title or claim to any of said lands, even if said provisions of said Article III were valid."

"Said Article is an act of spoliation and lawless confiscation, and is revolutionary and subversive of all constitutional and orderly government."

"A judgment of a State court, even if it be authorized by statute, whereby private property is taken . . . for public use without compensation . . . is wanting in due process of law."

Mr. Justice Harlan
in Chicago, B. & Q. R. Co. vs. *Chicago, 166 U. S., 241.*

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand . . . the denial of equal justice is still within the prohibition of the Constitution."

Mr. Justice Matthews
in Yick Wo vs. *Hopkins, 118 U. S., 374.*

All these specifications of error were stated and argued in the brief of plaintiff in error on the hearing before the Court of Appeals of Case No. 223 and were considered by that Court in its Opinion (Record No. 223, fols. 179–189); were reiterated in the petition for rehearing (*Id.*, fols. 262–279; 294–305), were set forth at large in the Amended Answer in Case No. 224 (fols. 244–245); and considered in the Opinion in case No. 224 (fols. 343–344); and are repeated in the same words in the assignment of errors in Case No. 223 (fols. 323–324) and in case No. 224 (fols. 347–348).

The two phrases of the same sentence of the Constitution will be considered together, for it seems it would be a waste of time to make distinctions, as needless as they are fine, between the numerous infringements of this clause both by the Legislature and by the Courts below by classifying them into such as are deemed denials of due process or denials of equal protection or denials of both. So, too, plaintiff in error will not seek to apportion the faults between the Legislature and the Courts of Kentucky. The plaintiff in error is not seeking to indict the Legislature or the Courts of Kentucky, but to save its property from unconstitutional confiscation by the State through any and all of its officers.

(1) The plaintiff in error is protected by this Section of the National Constitution.

A corporation is a person within the meaning of the Fourteenth Amendment (Covington, etc., Co. *v.* Sandford, 164 U. S., 578; Smyth *v.* Ames, 169 U. S., 466; Minnesota Ry. Co. *v.* Beckwith, 129 U. S., 268; Charlotte C., etc., R. Co. *v.* Gribbes, 142 U. S., 386); and for purposes of jurisdiction is deemed a citizen of the State under whose laws it was incorporated; (Lafayette Ins. Co. *v.* French, 18 How., 404); and if not prohibited a foreign corporation may make contracts and acquire, hold and convey property, as it would have a right to do in the State of its origin (Christian Union *v.* Yount, 101 U. S., 352, citing many cases, including Lothrop *v.* Commercial Bank, 38 Ky. (8 Dana), 114). A corporation might hold lands at common law, and can do so now under

the laws of Kentucky, except only in so far as restricted by the objects of incorporation and the terms of its charter (Lathrop *v.* Commercial Bank, *supra*); and is to be deemed and taken as a person when the circumstances in which it is placed are identical with those of natural persons, expressly included in a Statute (City of Louisville *v.* Commonwealth, 62 Ky. (1 Duv.), 295); and has the right to go into another state without the consent of the State in which it is established and may do anything in the State to which it removes that it may be authorized to do by the laws of that State (Bramlette *v.* Boyce, 4 Ky. L. Repr., 196); and if chartered in one State may sue in the courts of another State (Pendleton *v.* Bank of Kentucky, 17 Ky. (1 Mon.), 171; 1903 Cumberland Tel. & Tel. Co. *v.* Louisville Home Tel. Co. 24 Ky. L. R., 1676; 72 S. W., 4.)

"Any property or any rights which become vested under a legitimate exercise of the powers granted (to a private corporation) no legislative act can take away" (Cooley, Const. Limit. (6 Ed.), 336, note. See *Id.*, pp. 710–711).

(2) The Fourteenth Amendment requires more than the "due process of law," theretofore required.

This it is respectfully submitted is evident both from the purpose and object of the Amendment and also as a necessary conclusion from the decisions of this Court in construing it.

"In the construction of the Constitution we must look to the history of the times, and examine the state of things existing when it was framed and adopted to ascertain the old law, the mischief and the remedy."

Rhode Island *vs.* Massachusetts, 12 Pet., 657.

The same rule, surely, applies in the case of Amendments.

A statement of the purpose and object is well known to this Court:

"On the argument of the San Mateo County case in the Supreme Court, December 19, 1882, he (Conkling) produced for the first time the journal of the Committee. This journal has never been published. His argument, which was printed and filed, showed, step by step, how the various provisions came to be in-

serted, and he affirmed that the Committee intended to give them the broadest scope and operation, and not in any way to confine their benefit and protection to the colored race. In the course of his argument Mr. Conkling said: 'At the time the Fourteenth Amendment was ratified, as the records of the two Houses will show, individuals and joint stock companies were appealing for Congressional and administrative protection *against invidious and discriminating State and local taxes.* One instance was that of an express company whose stock was owned largely by the citizens of the State of New York, who came with petitions and bills seeking acts of Congress to aid them in resisting what they deemed *oppressive taxation* in two States, and *oppressive and ruinous rules of damages* applied under State laws. That complaints of oppressions in respect of property and other rights, made by citizens of North ern States who took up residence in the south, were rife, in and out of Congress, none of us can forget.'"

Guthrie, The Fourteenth Amendment, pp. 24–25.

"Mr. Bingham who drafted the first section of the Fourteenth Amendment with the exception of the first clause" stated in debate in Congress "that the decision of Marshall in Barron *vs.* The Mayor and City Council of Baltimore (7 Peters, p. 250) induced him to attempt to impose a new limitation upon the power of the States by constitutional Amendment. *In this case the City had taken private property for public use without compensation.*"

Flack, Adoption of Fourteenth Amendment, p. 233.

Whatever may have been the power of any state over the life, liberty, or property of persons under its own Constitution or the rulings of its own Courts, prior to the adoption of the Fourteenth Amendment, it was intended that thenceforth the life, liberty, and property of the citizen should be held "secure from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice."

Scott *v.* McNeal, 154 U. S., 34.

"It is, however, necessary, to observe the substantial distinction between the fifth amendment, which is obligatory only on the United States, and the fourteenth amendment, which is obligatory only on the states. The limitation in the former is 'without due process of law.' In the fourteenth amendment this

limitation is accompanied with a prohibition of the denial of the 'equal protection of the laws.' Of course, the latter expression is broader than the former, although it must be conceded that the mere denial of the 'equal protection of the laws' might run into the other limitation."

United States *v.* New York, N. H., etc., R. Co., 165 Fed., 746.

Hence it is respectfully submitted that either the phrase "due process" means more than it did before the amendment, because it is now coupled with the phrase "equal protection," and hence, according to a well established cannon of intepretation, receives a new meaning from its context, or else that the phrase "equal protection" excludes much more than the narrow discrimination above mentioned.

So that whatever may be the rule with respect to the Fifth Article of the Constitution, it is respectfully submitted that the declarations of Mr. Justice Marshall, of Mr. Justice Story and of many other of the Justices of this Court regarding the limits of legislative power irrespective of the restrictions of a written constitution now have the full force of the Fourteenth Amendment which, taken as a whole, clearly prevent either the legislature or judiciary of the State from enacting and enforcing the Statute in question in the cases now at bar.

(3) A "day in Court" in the State Court does not make this Article III and the proceedings thereunder constitutional or valid.

An attempt to evade these constitutional provisions by providing that the victim shall have a "day in court" is a mere mockery, if the victim, when he comes into court, is not allowed to plead his real defense, that the act is unconstitutional, because its provisions, including the day in court, do not constitute "due process of law," and are not the "law of the land," because the other provisions of the act are outside the scope of legislative power:

"An unconstitutional law is not a law. It confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as if it had never been passed."

Norton *vs.* Shelby County, 118 U. S., 425.

"The State has passed no such law, for it cannot; and what it cannot do, in contemplation of law, it has not done."

Poindexter *vs.* Greenhow, 114 U. S., 270.

"It is no matter by what proceeding, or in what manner, the State deprives the person of life, liberty, or property, or denies him the equal protection of the law, without due process of law, whether by legislation or *judicial decision*, or by what officer or agent, or agency, so it be by State authority." Brannon, *Fourteenth Amendment*, p. 97.

In Scott *v.* McNeal, 154 U. S., 34, it is said:

"These prohibitions (of the Fourteenth Amendment) extend to all acts of the States, whether through its legislative, its executive, *or its judicial authorities*. . . . Upon a writ of error to review the judgment of the highest court of a State upon the ground that the judgment was against a right claimed under the Constitution of the United States, this Court is no more bound by *that Court's construction of a statute of the territory or of the State* when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law."

If this Court finds an act of legislature to be void, the proceedings of a State court deriving its powers from the void act and purporting to execute its provisions must be void, both because of lack of jurisdiction of the subject matter and also because judicial proceedings to enforce a void act cannot possibly be due process of law.

The minimizers of the Fourteenth Amendment have sought to deprive it of most of its power by contending that all that the Amendment requires is a "day in court in the State courts, and that no discrimination should be made by those courts between victims of the same class or condition." In this they, it is respectfully submitted, are opposed to the decisions of this Court.

The rule that "the decision of a State court, involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property," Tracy *v.*

Ginzberg (205 U. S., p. 170), does not apply where either the statute itself as construed by the State courts or the proceedings thereunder are unconstitutional as taking property without due process of law. A most convincing reason for the rule has been recently stated by this Court speaking by Mr. Justice Harlan, viz.: "Under the opposite view every judgment of a State court involving merely the ownership of property could be brought here for review,—a result not to be thought of" (Tracy *v.* Ginzberg, *supra*).

The distinction is somewhat analogous and quite in conformity with that also made by this Court which refuses to permit suits against State officers who are executing or about to execute *constitutional* State laws, since this would be in effect permitting a suit against the State, but permits a suit against an officer who "by virtue of his office has some connection with the enforcement of an act" which is *unconstitutional.*

Ex parte Young, 209 U. S., 123 (citing a dozen other cases).

The only important distinction between the unconstitutional acts of administrative officers on the one hand and of the judiciary of a State on the other is that an injunction will sometimes lie against the former, but the remedy against the latter is by writ of error on the judgment. (*Ex parte* Young, *supra.*)

And among the decisions of this Court construing this Amendment, there are many cited elsewhere in this argument which have held void acts of State legislatures and judgments of State courts which did not discriminate between those of the same class or condition, but were held void as prohibited by the Fourteenth Amendment because clearly an arbitrary exercise of legislative or judicial power contrary to plain principles of justice. *There are wrongs so deep and grave that they make all men to be of the same class,* and among such wrongs, it would seem, must be an attempt to "outlaw" those who have been guilty of no crime.

The general rule that this Court will accept without question the decision of the State Court that a State

statute conforms to the *State* Constitution does not apply to the question now before the Court.

"The single question presented for decision is whether he (plaintiff in error) has been deprived of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. It is only as bearing on that question that this Court upon a writ of error to a State Court, has jurisdiction to consider whether the Statute conforms to the Constitution of the State."

Head *v.* Amoskeag M. Co., 113 U. S., 9.

Nor is this Court bound to follow a change of decision of the State Court made after rights have vested under a different construction of law previously enunciated by the same Court.

Gelpcke *v.* Dubuque, 1 Wall, 210; Douglas *v.* Pike County, 101 U. S., 677, 686; Fairfield *v.* Gallatin, 100 U. S., 47, and many other cases, *supra.*

The judgment of a court of the State is void when it denies "due process of law."

Old Wayne, etc., Asso. *v.* McDonough, 204 U. S., 8.
Ex parte Virginia, 100 U. S., 339, 346, 347, 354, 676, 680.
Neal *v.* Delaware, 103 U. S., 370, 264, 567.
Yick Wo. *v.* Hopkins, 118 U. S., 356, 304, 220.
Gibson *v.* Mississippi, 162 U. S., 565, 404, 1075.
Missouri, etc., Ry. Co. *v.* Nebraska, 164 U. S., 403.
Houston, etc., Co. *v.* Texas, 177 U. S., 66.
Bradley *v.* Lightcap, 195 U. S., 1.
Stuart *v.* Palmer, 74 N. Y., 183.
Union Bank *v.* Board of Commrs., 90 Fed., 7.
Ho Ah Kow *v.* Nunan, Fed. Cas. No. 6546.
In re Tiburcio Parrott, 1 Fed., 481; Ky. L. R., 136.
Railroad & T. Cos. *v.* Board of Equalizers, 85 Fed., 302.
Meacham *v.* Bear Valley, etc., Co., 145 Cal., 606.
University of South *v.* Jetton, 155 Fed., 182.

In old Wayne Asso. *v.* McDonough (*supra*) this Court reversed the judgment of the State Court which had jurisdiction of the parties and had given them a hearing and rendered judgment in due form, but the reversal was on the ground that the judgment of the court of another

state upon which the judgment appealed from was based had been obtained without due process of law, and hence that the judgment appealed from, *notwithstanding the jurisdiction over the parties and the hearing and adjudication, was not due process of law.* This Court then said:

"No state can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in the due process of law enjoined by the fundamental law . . . No state can by any tribunal or representative render nugatory a provision of the supreme law. And if the conclusiveness of a judgment or decree in a court of one state is questioned in a court of another government, federal or state, it is open under proper averments to inquire whether the court rendering the decree or judgment had jurisdiction to render it. Such is the settled doctrine of this Court."

Old Wayne Asso. *v.* McDonough, 204 U. S., 8, 15, citing Scott *v.* McNeal, 154 U. S., 34, 46; Thompson *v.* Whitman, 18 Wall., 457, 468; Rose *v.* Himely, 4 Cranch, 241, 269; Williamson *v.* Berry, 8 How., 495, 540; Story, Comm. on Const., 1313; Mills *v.* Duryee, 7 Cranch, 481, 484; Galpin *v.* Page, 18 Wall., 350, 365, 366, 368.

"It is no objection to the remedy in such cases that the statute, the application of which in the particular case is sought to be prevented, is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right; for the cases are numerous where the tax laws of a State, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts prohibited by the Constitution, or because in some other way they operate to deprive the party complaining of a right secured to him by the Constitution of the United States."

Poindexter *v.* Greenhow, 114 U. S., 271.

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances,

material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Yick Wo *vs.* Hopkins, 118 U. S., 356.

"When a Statute, harmless on its face, is systematically enforced in violation of fundamental rights, the procedure is not due process of law, and may be declared void and set aside by the Courts under the jurisdiction conferred by the 14th Amendment."

Guthrie, 14th Amend., p. 73.

Mr. Justice Moody, speaking for this Court, has said:

"This Court has always declined to give a comprehensive definition of it" (due Process) "and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of decisions of cases as they arise. There are certain general principles, well settled, however, which narrow the field of discussion and may serve as helps to correct conclusions. These principles grow out of the proposition universally accepted by American Courts on the authority of Coke, that the words 'due process of law' are equivalent in meaning to the words 'law of the land,' contained in that Chapter of Magna Charta which provides that 'no freeman shall be taken, or imprisoned, *or disseised, or outlawed,* or exiled, or in anywise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land' Den ex dem. Murray *v.* Hoboken Land & Improv. Co., 18 How., 272; Davidson *v.* New Orleans, 96 U. S., 97; Jones *v.* Robbins, 8 Gray, 329; Cooley, Const. Lim., 7th Ed., 500; McGhee, Due Process of Law, 16." . . .

"Consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law, and *protect the citizen in his private right, and guard him against the arbitrary action of government.* This idea has been many times expressed in differing words by this Court, and it seems well to cite some expressions of it. The words 'due process of law' were intended *to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.*"

Twining *vs.* State of New Jersey, 211 U. S., at pp. 100, 101.

In this last cited case it is iterated and reiterated, and illustrated by an abundance of authorities, that the Fourteenth Amendment is not aimed at the forms of procedure and does not even require that the procedure shall be according to the Common law; but that the Constitution, and this Court in construing it, looks to the substance, not the form; and in the opinion supporting the "process" in that case this Court takes care to say that "we are not here concerned with the *effect* of due process in restraining substantive laws, as for example, *that which forbids the taking of private property for public use without compensation.*" (*Id.*, p. 110).

. . . "*Beyond question the Legislature cannot take the property of one citizen and give it to another. Neither can it do so indirectly by depriving one of the right to set up a defense perfect in him at the time. It is a part of our fundamental law that no one can be deprived of his property without due process of law. This not only requires that a party shall be brought into Court, but* **that he shall have the opportunity when there to assert any defense to which he has become entitled, and which will protect his property.**"

McCracken *v.* Mercantile T. Co., 84 Ky., at p. 352.

This Court, by Mr. Justice Harlan, has said:

"In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State, or under its direction, for public use without compensation made or secured to the owner, is, upon principle and authority, wanting in due process of law required by the Fourteenth Amendment of the Constitution of the United States, and *the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner* of that instrument." . . .

"But a State may not by any of its agencies disregard the prohibitions of the Fourteenth Amendment. *Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance not to form.*

"This Court referring to the Fourteenth Amendment has said: 'Can a State make anything due process of

law which by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation' (Davidson *v.* New Orleans, 96 U. S., 97, 102). The same question could be propounded and the same answer should be made in reference to *judicial proceedings* inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then the final judgment of a State court under the authority of which the property is in fact taken, is to be deemed the act of the State within the meaning of that amendment."

Chicago, B. & Q. R. Co. *v.* Chicago, 166 U. S., 234, 235.

And, speaking by Mr. Justice Brewer, this Court has said that it is

"not open to further debate . . . that this Court may examine proceedings had in a State Court, under State authority for the appropriation of private property to public purposes so far as to inquire *whether that Court prescribed any rule of law in disregard of the owner's right to just compensation*" (Backus *v.* Fort S. U. Depot Co., 169 U. S., 557, 565).

The law was summarized not long ago, as follows:

"The provisions of the 14th Amendment are not confined to the action of the State through its Legislature, or through the executive or judicial authority. Those provisions relate to and cover *all the instrumentalities by which the State acts*, and so it has been held that *whoever by virtue of public position under a State Government*, deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name of the State and for the State, and is clothed with the State's powers, his act is that of the State."

Mr. Justice Peckham, delivering the opinion of this Court in

Raymond *v.* Chicago Union T. Co., 207 U. S., 20, 36, citing Chicago, etc., Co. *v.* Chicago (*supra*).

(4) The decision of this Court in King vs. Mullins does not tend to sustain the Statute and proceedings thereunder in the cases now at bar.

This is true:

(*a*) because the Constitution and Statutes construed in

King *vs.* Mullins, and the proceedings thereunder, contained none of the worst atrocities shown in the cases now at bar; and (*b*) because this Court in King *vs.* Mullins passed only upon the question whether in that case there was a sufficient "day in court" to constitute due process taken in connection with the other conditions there shown.

It would be less necessary to dwell upon these distinctions, which seem to be so clear, were it not that both the instigators of Article III and the Court of Appeals, which has attempted to enforce it, have claimed that this Article is similar to the laws of Virginia and West Virginia, and that King *vs.* Mullins justifies the proceeding in the cases now at bar.

The brief of plaintiff in error, submitted to the Court of Appeals on the hearing of Case No. 223, contained the following:

"*Article III of the Act of March 15, 1906, has no precedent for its atrocities.*

"None but itself can be its parallel."

"The promoters of Article III, it would seem, based their labors on certain provisions of the Statutes of West Virginia adding thereto some 'improvements' due to the ingenuity of the promoters' counsel.

"As neither these statutes nor the decisions construing them have any authority in this Court and are indeed contrary to the entire policy of this Commonwealth, as shown in the acts of its Legislature and decisions of its supreme tribunal for nearly a century, it would seem unnecessary to impose further upon the patience of the Court by an extended discussion."

"Rigorous as these statutes and decisions of the courts of West Virginia are, and unsuited to the conditions and in some respects contrary to the decisions of the Court of Appeals of Kentucky, they neither "provide for" nor sustain the validity of the principal atrocities of Article III herein already considered."

After reviewing a part of the statutes and decisions of the courts of Kentucky bearing on the question, the opinion of the Court in the case now at bar proceeds as follows:

"It will be remembered that in Virginia there was substantially the same state of affairs as in parts of Kentucky, for that region lying between the Allegheny

mountains and the borders of Kentucky was of the same character of land, and had been appropriated by the same methods and under the same system, and at or about the same time, as had the lands in Kentucky. Naturally, the same result ensued." (Record No. 223, fol. 163.)

To this it was said in the petition for rehearing:

"This statement, it is submitted, is unfair, because it implies, what is afterwards expressly declared in the opinion, that the same conditions existed in Kentucky, when the Act of 1906 was enacted, as existed in Virginia, when the acts alleged by the Court to be similar thereto were enacted.

"The Acts of Virginia and West Virginia were probably the consequence in part, at least, of the overlapping in whole or in part of ancient patents and the difficulty of determining who was the true owner.

"The Kentucky Act of 1906 is an attempt to vest title of wild lands in occupants who do not claim under an ancient patent of any kind but under recent bogus 'patents' which are absolutely null and void, under the statutes and decisions of the Courts of Kentucky, as shown in Appellant's Brief (pp. 28, 29) and elsewhere in this argument." (Record No. 223, fols. 223-224.)

The Court also said:

"In 1790 the Commonwealth of Virginia enacted a statute (13 Hennings Statutes at Large, 116, Section 5), by which title to lands not tax-paid for three years were 'forfeited and vested in the Commonwealth.' The act was extended and re-enacted in increasing vigor in 1792, 1803 and 1810. In 1835 a still more drastic act was adopted (Hutchinson on Land Titles of Virginia and West Virginia, 62), the salient features of which are incorporated in the act of Kentucky now being investigated, except that in the Virginia Act there is no provision for an inquisition of office, or its equivalent, as there is in the Kentucky Statutes." (Record No. 223, fol. 163.)

To which in the petition for rehearing:

"This statement, it is submitted, is erroneous in several respects, the consequence, it would seem, of the reliance by the Court upon statements in the brief of counsel opposing the appellant who were allowed to be heard on the argument.

"The Virginia Act of 1790 did not attempt to forfeit any lands for failure to list for taxation, but only for failure for three years to pay taxes *assessed*. The earliest act proposing to forfeit for failure to *list* or enter on

the books for taxation was the Virginia Act of February 5, 1810; but this act never became operative. Its operation was postponed by later acts till the Act of February 9, 1814, which repealed all laws proposing to forfeit lands for failure to enter them on the tax books and *remitted all forfeitures* for that cause" (Hutchinson Land Titles, pp. 5, 6 and 7).

"Although this repeal and rescission is not generally stated in the decisions of the Virginia courts which review the statutory legislation of Virginia regarding forfeitures, it is clearly shown by referring to the Virginia Statutes, and, as already stated in appellant's brief, the Court of Appeals of Virginia have expressly declared that

'prior to the passage of the law of 1835 providing for the entry of lands on the Commissioner's books and forfeiting all lands not so entered, there was no law in force declaring a forfeiture of such omitted lands.' 1858, Hale *v.* Marshall, 14 Gratt., 289.

'Under the Virginia statute of 1790 providing that a failure to pay taxes should forfeit the land before any forfeiture could occur the land must be assessed, listed, returned to the auditor of public accounts and advertised. Kinney *v.* Beverly, 2 Hen. & M., Va., 318.'

"The Virginia Act of 1835 provided that grants from the State would be forfeited on July 1, 1836, unless entered before that time on the Commissioner's books and all arrears paid. By acts of March 23, 1836, March 30, 1837, and March 15, 1838, the time of redemption was in each case extended. Bowman *v.* Dewing, 37 W. Va., 117 (16 S. E., 440.)

"The statutory law to-day in Virginia seems to be as follows:

'Any person owning or claiming real estate in this State shall, if the same be not already there, cause it to be entered on the land books.'

Va. Acts 1874, p. 386; now in
Va. Code (Pollard, 1904), Sec. 634.

'If such owner or claimant shall neglect to enter his real estate as provided by the preceding section for a period of five years after notice in writing by a commissioner authorized to assess the same, such real estate shall be absolutely forfeited to the Commonwealth and be liable to entry and survey as waste and unappropriated lands under Chapter 104.'

Va. Acts 1874, p. 386; now in
Va. Code (Pollard, 1904), Section 635.

"The last cited section in above cited edition of the Code has the following note, which would seem to indicate the position of the bar of Virginia:

'This statute is constitutional (Wilds Lesse *v.* Serpell, 10 Grat., 405). But see King *vs.* Mullins, 171 U. S., 404 (18 Sup. Ct., 925, 43 L. ed., 214). *For comments on same see 4 Va. Law Reg., 194, where it is observed that the reasoning in the last mentioned case would lead to the conclusion that this section is unconstitutional.*'"

Va. Code (Pollard), 1904.

As to West Virginia the Court of Appeals in its opinion said:

"West Virginia was erected into a State in 1863. All of her territory was carved out of old Virginia, and was wholly within the zone affected by the system of grants above discussed. In her Constitution is a provision *in every feature or principle the same as the Kentucky Statute of 1906*, except in the West Virginia Constitution there is not a provision for a trial in court concerning the proposed forfeiture (Article 13, Sections 1–6, W. Va. Constitution") (Record No. 223, fols. 163–164).

To which the petition for rehearing:

"This, it is submitted, is all wrong. The Court must have been misled in this, as in various other points, by the statements of opposing counsel, who were allowed to step into the shoes of the Commonwealth to oppose the appellant. The Court could not have had before it a copy of the Constitution of West Virginia.

"West Virginia (instead of seeking, like the Legislature of Kentucky, or rather, like the real promoters of Article III, to forfeit for delinquencies prior to the enactment of the law), by its first Constitution extended for five years the owner's time to list his lands, during which five years no acts to forfeit lands were allowed (W. Va. Const., 1864), and in 1869, at the expiration of such five years, the Legislature granted still one more year (W. Va Acts 1869, pp. 88, 90, Ch. 125, Section 7), and in 1871 extended time for redemption, subject to rights meanwhile acquired, two years from the passage of that act (W. Va. Acts 1871, p. 183, Ch. 138); and by the Constitution of 1872 made the condition of forfeiture that the owner of a tract of over one thousand acres should have failed to charge the land on the land books for five successive years *after the year* 1869 (W. Va. Const., Art. 13, § 6; W. Va. Code 1906, Art. 13, § 6).

"He [the owner] was given more than two years substantially from the date of its adoption by the people to perform this constitutional requirement; for it gave him five years from and after the year 1869 to do so, which was equivalent to two years from and after the year 1872" (U. S. Circ. Ct. W. Va., 1907; Fay *vs.* Crozer, 156 Fed., 486).

"Besides all this, the West Virginia Constitution (instead of the brutal disregard of the rights of infants, married women and the insane, displayed in the Kentucky Act of 1906), provided for a period of grace of three years after removal of disability for all those laboring under such disabilities, which right to redeem might extend to twenty years from the time the land was forfeited (West Va. Const., 1872, Art. 13, § 6; W. Va. Code, 1906, Art. 13, § 6)."

The traditions of the Legislature and the Judiciary of Kentucky are entirely independent of those of Virginia after Kentucky became a State. Not only the statutory law is very different; but "after the first three volumes of Kentucky Reports which run from 1792 to 1808 references to Virginia decisions become very rare, much rarer than to those of New York" (Dembitz, Kentucky Jurisprudence, p. 8, note).

And all prior attempts to forfeit titles under the Virginia patents have been held void as against the Compact, or for other reasons ineffective. The Act of 1801 and of 1827 were both prospective only and gave ample time for redemption, but the former was held unconstitutional in Barbour *v.* Nelson, 11 Ky. (1 Litt.), 61, and Harlan *v.* Seaton, 57 Ky., 261, and the latter in Marshall *v.* McDaniel, 75 Ky. (12 Bush), 380.

This Article III was drawn by a West Virginia lawyer who appeared in this Court in the argument of King *vs.* Mullins, and the hopes of the instigators employing him seem to have been based on the fact that they were themselves, or hoped others would be, ignorant of (1) the meaning of the provisions of the Compact of Dec. 18, 1789, protecting rights and interests in Kentucky lands derived from Virginia; (2), the difference between the past laws of Virginia and West Virginia as compared with those of Kentucky since its origin in 1792; (3), the differences between the existing laws of Virginia and West

Virginia on the one hand, as compared with the "law" sought to be enacted by Article III of the Act of 1906 on the other; (4), the glaring inconsistencies and contradictions between this Article III and many provisions of other Articles of the same Revenue Act, re-enacting and continuing prior statutes of Kentucky on the same subject; (5), the limited scope of the decision in King *vs.* Mullins, even as applied to the laws of Virginia and West Virginia, which decision is confined by the express words of the Court *to the laws of those States alone*, and to the question whether those laws provided "due process of law"; and hence (6), the many violations of the National Constitution by this Article III and by the attempted proceedings thereunder.

The Court below in its effort to carry out what it has found to be the intention of the Legislature, to "outlaw," to wit, to confiscate the title of the true owners of these lands, has practically overruled its prior decisions and sought suddenly to change the policy of the Commonwealth to correspond with what the Court erroneously contends has for many years been the policy of West Virginia where such a change would seem to help to sustain the confiscation, while at the same time the same Court has adopted a different rule from that of West Virginia, where the true owners had conformed to the West Virginia rule in their efforts to comply with the terms of this unconstitutional enactment.

Almost all the statements of the Court of Appeals in its opinion as to the laws of West Virginia are clearly errors.

No evidence was introduced to show these laws of Virginia and West Virginia, and the Court of Appeals of Kentucky, unlike this Court, could not take judicial notice of such laws of other States (Ky. Stats., § 1642).

In what here follows, for simplicity's sake and to confine the question to that now before the Court, the laws of West Virginia alone will be considered as compared with those in question in the cases now at bar, because the Virginia laws were intended to be confined like many other early land laws of Virginia to that part "West of the Alleghany mountains." The Acts of April 1, 1831,

and February 27, 1835, expressly so state (State *v.* West Branch L. Co., 63 S. E., at p. 377; State *v.* King (W. Va.), 63 S. E., at p. 471), and were intended to apply to "the peculiar condition of things in that part of the State" (Wild *v.* Serpell, 10 Grat., 405, 406, cited by this Court in King *vs.* Mullins, 171 U. S., at p. 413, *ad fin*). Within the now existing boundaries of Virginia it is believed that there is but little if any land whose title depends on these forfeiting acts, and the Virginia provisions are still regarded in that State as of doubtful constitutionality (*supra*, p. 204).

The West Virginia doctrine consists of two parts: (*a*) the provisions of the State Constitution and Statutes forfeiting land for failure to list, which has already been considered, and (*b*) the court-made rule that the listing and payment of taxes by an adverse claimant shall not avail the true owner.

"Neither the Act of 1831 or any other act of the legislature ever declared a forfeiture of any tract of land on which taxes had been assessed and paid." State *v.* West Branch Lumber Co. (West Va.), 63 S. E. 377.

This court-made rule was first announced in Simpson *v.* Edmiston, 23 W. Va., 675, and there applied only to "hold that payment of taxes on land by a tax-sale purchaser whose deed is invalid does not enure to the benefit of the person in whose name the land was sold, and the prior cases in Virginia and West Virginia (Yancy *v.* Hopkins, 1 Munf. (Va.), 419); Lohrs *v.* Miller, 12 Grat. (Va.), 452; Witham *v.* Sayers, 9 W. Va., 671, and Bradley *v.* Ewart, 18 W. Va., 589), were distinguished on the ground that the parties assessed "claimed the land in privity and by the same title." All this is stated in Webb *v.* Ritter (W. Va.), 54 S. E., 494.

The judge who made the rule was, however, afterwards unwilling to carry it out to its logical consequences. He was "unwilling to extend the principle he had laid down in Simpson *v.* Edmiston and sought a ground of distinction." (State *v.* West Branch L. Co. (West Va.) 63 S. E., at p. 381); in doing which he ignored a former decision of the same Court and also decisions of the Supreme Court of Appeals of Virginia and a decision of the Court in which

he had concurred and the express terms of the Statute (*id., ib.*).

It is no wonder then that this doctrine of Simpson *v.* Edmiston has been called "somewhat anomalous" (State *v.* Harman (W. Va.), 50 S. E., at foot of p. 828), and has been made subject to some anomalous exceptions (Bailey *v.* McClaugherty (W. Va), 37 S. E., 701, and other cases, *infra*). But it has been followed in a number of other cases and extended by the Courts of West Virginia so as to include many cases where the person listing and paying the taxes claimed adversely to the true owner (Webb *v.* Ritter, *supra*; Stockton *v.* Craig, 56 W. Va., 264; 49 S. E., 389, 390; State *v.* McEldowney, 54 W. Va., 695; 47 S. E., 650; State *v.* Sponaugle, 45 W. Va., 415; 32 S. E., 283).

On the other hand it has been conceded by the Supreme Court of Appeals of West Virginia in discussing this doctrine, that the case of Bailey *vs.* McClaugherty (W. Va.), 37 S. E., 701, "may not be in strict conformity therewith" (Webb *v.* Ritter (W. Va.), 54 S. E., 494, and it has also been stated by the same Court that

> "In Whitham *v.* Sayers, 9 W.Va., 671, it is held that when the same land is charged by the assessors with taxes in the name of the grantor and his grantee, and the taxes paid by the grantee, if the land is sold for the non-payment of taxes assessed against the grantor the purchaser at such sale acquires no title; and the same principle is held in Bradley *v.* Ewart, 18 W. Va., 598. 'Payment of the taxes by the owner, or by any one entitled to make it, is an absolute defeat and termination of any statutory power to sell. The persons who besides the owner are entitled to make payment are those who are assessed for the tax, and any others whose interests would be injuriously affected by a sale, either because of liens they may have or of contract relation; and any one having the right may depute another to make it for him.' Cooley, Tax'n, 322. In Sturm *v.* Fleming, 26 W. Va., 54, it is held that: 'The payment of taxes on land by a purchaser thereof at a judicial sale, which is subsequently set aside and declared void, will be treated as a full satisfaction of all the taxes on said land for the time they shall have been so paid; and the owner of the land so sold will not forfeit his title thereto by reason of his not having had the land assessed and the taxes paid thereon in his name during

the time the taxes were so paid by such purchaser.' The same principle is held in Hall *v.* Hall, 27 W. Va., 468. See also Lohr's *v.* Miller's Lessee, 12 Gratt., 452." State *v.* Low, 33 S. E., 274.

In the very recent case of State *v.* West Branch L. Co. (*supra*), the Court also disapproves the decision on one point in State *v.* Sponaugle (*supra*), and State *v.* Harman, (57 W. Va., 447; 50 S. E., 828), and states that the doctrine of the latter case is based on a fiction (63 S. E., at pp. 385 and 381).

But, again, in the third place, since the decision by this Court in King *vs.* Mullins, the Supreme Court of Appeals of West Virginia, speaking by its President, Judge Poffenbarger, in seeking "to eliminate the oppressive consequences and effect accorded to it (the doctrine of Simpson *v.* Edmiston) in some later decisions," and sustaining a title against forfeiture although the claimant's tax deed was void and the land was forfeited for failure to list of the prior true owners, says:

"The State proceeds upon the theory of a forfeiture for nonentry, not in the names of Corley and Morrison, or other tax deed grantee, or any one to whom the claim under the tax deed passed, but upon the theory of a forfeiture for nonentry in the name of the Albright heirs and Giger, the tax deed being considered void, in consequence whereof payment of the taxes by one claiming under it does not, under the doctrine announced in Simpson *v.* Edmiston, 23 W. Va., 675, as it has been applied in later decisions, protect the land from forfeiture.

"The legal proposition upon which the bill is predicated has been regarded for some years, by this Court and the profession in general, as sound, and as having the wide operations and effect claimed for it; but a long and patient investigation, both before and after elaborate argument by able counsel, has impressed upon me *a grave and serious doubt, to say the least, as to its consonance with the spirit of our constitutional and statutory system of law* applicable to the subject . . . A decided aversion, on the part of my Associates, to the overruling of numerous decisions in which the doctrine of Simpson *v.* Edmiston has been adhered to and applied, and some doubt on my part as to the wisdom of so doing, leave it, as originally stated, unimpaired; but

> our interpretation of the statutory provision, to which reference has been made, eliminates the oppressive consequences and effect accorded to it in some later decisions in which this view of the statute was not presented or adverted to" (63 S. E., 373-4);

and thereupon, in the course of a long and able review of the Statutes and authorities, the Court wrestles manfully with the problem of reconciling, so far as possible, the decision in the cases then at bar with the prior decisions of the Court (and cites Lynch *v.* Andrews, 25 W. Va., 751; Sturm *v.* Fleming, 26 W. Va., 54; Bradley *v.* Ewart, 18 W. Va., 598; Lohrs *v.* Miller, 12 Grat., 452; Hitchcox *v.* Rawson, 14 Grat., 526; McClure *v.* Maitland, 24 W. Va., 561).

State *v.* West Branch Lumber Co., 63 S. E., 372.

When to all this is added that these forfeiting statutes, so construed, make the true owner's title depend not merely on his title deeds and the records thereof, but possibly on his success in preserving all his tax receipts from loss or destruction, it is not easy to see how these laws have succeeded in settling titles, as this Court was assured was true on the argument of King *vs.* Mullins, although it is easy to see how such laws afford a highly expeditious method by which occupants may hope to evade the ordinary statutes of limitation and acquire a claim to wild lands, often owned by non-residents, which the so-called occupants have not really occupied or improved, and about which they have done nothing but pay five years taxes, or say, from five to ten per cent. of the estimated value of the land, often much more than reimbursed by denuding them of timber.

But counsel for plaintiff in error are not here to contend that these laws of West Virginia are wrong or incomprehensible, but merely that they are radically different from those that always have existed in Kentucky, as evidenced by its Statutes and the decisions of its Courts until the enactment and attempted enforcement of this Article III. Among these many differences the here following seem to be all that need to be now called to the attention of this Court:

(*a*) *In West Virginia* there is not the slightest trace of an *ex post facto* element. On the contrary both the

original acts of Virginia and the provisions of the West Virginia acts were not only prospective but extended the original time by later acts. The provisions of the Constitution of West Virginia (Art. 13, 6) and acts (1869, pp. 90–92; 1872, C., 17, 39; 1882, C., 130; West Va. Code. Anno., 1906) were, like the lawful acts of all other legislatures dealing with questions of forfeiture, prospective only, and applied to failures to list during years subsequent to the first enactments of these statutes; and provide that "if for any one or more of such five years the owner shall have been charged with State tax or any part of the land, such part thereof shall not be forfeited for such cause" (W. Va. Code, Sec. 898), according to which the omission of land from the books for only two years or any time less than five years and failure afterwards to charge up back taxes does not work forfeiture" (Lasher *v.* McCreery, 66 Fed. R., 834).

But in Kentucky this Article III, as construed by the Court of Appeals, is, it is submitted, one of the most atrocious attempts at *ex post facto* legislation that can be found on the statute books of any country in the world (*supra*, pp. 74–96). Provisions similar to those of West Virginia would not at all serve the purposes of the promoters of Article III. They accordingly provided that "no owner or claimant of any land in this commonwealth shall be allowed to prevent the operation of this article by the payment after January 1st, 1906 (a date over two months before the enactment of the article), of any amount less than the whole of the unpaid taxes, interest and penalties provided by law that were charged and *that should have been* charged against said owner or claimant of land and *those under whom he claims* as of each and all of said five dates" (Record No. 223, fol. 150).

Hence an owner could not escape from the net of the instigators of Article III even by paying before the article was enacted if after January 1, 1906.

(*b*) *In West Virginia* the "private rights and interests" under the earliest patents were to be held valid and secure according to the laws of Virginia as they existed in 1863, when West Virginia became a State; for which reason this Court reviewed the Virginia law up to that time

(King *v.* Mullins, 171 U. S., at p. 410). *But in Kentucky* such "private rights and interests" are to be held "valid and secure" according to the laws of Virginia as they existed December 18, 1789, at which date there were no Virginia laws authorizing forfeiture for failure to list (*supra*, p. 164); and the Compact expressly provided that no subsequent grants from Kentucky should "interfere" with the Virginia grants (*Id.*, p. 98).

(*c*) *In West Virginia* the question whether the forfeiture acts do not impair the obligation of contracts, by making as a condition subsequent for forfeiting title that which could only be possible as a condition incorporated in the original grant or in the Statutes existing at the time of the grant seems never to have been raised or considered by the Courts, since Kinney *v.* Beverley, 2 Hen. & Mun., 332. *But in Kentucky* this objection has been made from the outset of the cases at bar as a ground that Article III thereby violates the National Constitution and the Virginia-Kentucky Compact (*supra*, p. 177).

(*d*) *In West Virginia* the provisions for redemption are fair. *But in Kentucky* they are clearly intended to be most onerous, and include among other things an *ex post facto* penalty, which is in itself enough to make the provision void (*supra*, pp. 12, 14) and other atrocious requirements (*id. ib.*).

(*e*) *In West Virginia* the statutes being prospective, with several years' grace, there was ample time to contest the validity of the statute before the penalty would be inflicted. *But in Kentucky* there was no time given for such or any other purpose, and this iniquitous Article III is void for that reason among many others (*infra*, p. 243).

(*f*) *In West Virginia* the constitution and statutes are consistent. *But in Kentucky* this Article III is not only *inconsistent with other articles of the same act and inconsistent with other statutes of the Commonwealth, but also violates the plain and clear provisions of the constitution* (*supra*, p. 4).

(*g*) *In West Virginia* there is no evidence of any intention of the Legislature or of the Courts to deny due

process and equal protection of the laws, if forfeiting acts for such causes can ever be anything else than such a denial. *But in Kentucky* this Article III as construed by the Court of Appeals fairly bristles both in itself and in its attempted enforcement with most emphatic denials of both due process and equal protection.

(*h*) *In West Virginia* the State has never attempted to set traps to forfeit the title of any one making an effort to list his lands, nor refused to permit such listing by any one; and the omission of land from the books of the commissioner of revenue for any time less than five years, and the failure afterwards to charge up the back taxes, does not work a forfeiture. Lasher *v.* McCreery (C. C.), 66 Fed., 834; and in King *vs.* Mullins this Court assumes that the West Virginia courts would grant a fair opportunity to the owner to comply with the statutes. *But in Kentucky* the owner could not escape the provisions of Article III even if he paid *prior to the enactment*, if after January 1, 1906 (*supra*, p. 18), and there is manifest a strenuous attempt on the part of the County officials (whose duty it is supposed to be to aid the increase of the revenues of the State) to prevent the listing of these lands; and the Court of Appeals has held that for arrears prior to the act the owner could not file his petition after January 1, 1907, and *no amendments of the petition could be made after that date* except by permission of the County Court, although there were no hearing till after that date (*supra*, p. 49); and no case has been found where either the County Court or the Court of Appeals has ever permitted an amendment of the petition, and in the only case where the Circuit Court allowed such amendment the Court of Appeals reversed the Circuit Court and declared a forfeiture (*supra*, p. 48).

(*i*) *In West Virginia:* "Taxation in the name of any person claiming the land in whole or in part under any given title prevents forfeiture, not only as to him and the portion of the land claimed by him, but as to all the land so taxed, and all persons claiming the same or any part thereof under the same title (Whitham *v.* Sayers, 9 W. Va., 671; Bradley *v.* Ewart, 18 W. Va., 598; Lynch *v.*

Andrews, 25 W. Va., 751; Hall *v.* Hall, 27 W. Va., 468; Lohrs *v.* Miller, 12 Grat., 452)." 1908, Sult *v.* Hochstetter Oil Co., 61 S. E., 307, 312: and the same was true of the early acts of Virginia (State *v.* King, 63 S. E , 468, 495); and payment by tenant in common of his share, *e. g.*, one-fourth the tax will not prevent forfeiture of the entire tract returned delinquent (Smith *v.* Tharp, 17 W. Va., 221). *But in Kentucky* when plaintiff in error sought to follow this rule the Court of Appeals, after seeking diligently for reasons for forfeiting the title by dismissing the petitions to list, held that the petitions were deficient for failing to disclose the "interest" of the plaintiff in error and for failing to state the name of its co-owners, although it did not appear that there were any such, and Article III did not require that they should be named (*supra*, p. 43).

(*k*) *In West Virginia* the Statutes have never been construed so that if an owner lists the land he claims to own and offers to pay taxes thereon he shall nevertheless forfeit his land for failure to list and pay taxes on other land described in the same patent but which he does not claim to own because it is owned by others under adverse titles. *But in Kentucky* Article III is so construed by the Kentucky Court of Appeals (1909, Commonwealth *v.* Gatliff, 116 S. W., p. 263).

(*l*) *West Virginia grants* to any owner of the land or any interest therein, who, at the time of forfeiture, "shall be an infant, married woman or insane person" "three years after the removal of such disability," within which period such owner may redeem on payment of the arrears of taxes and interest chargeable on the land, or such interest therein, "or any part thereof" provided such period for redemption shall not extend beyond twenty years" (W. Va. Code, 1906, p. 424).

But in Kentucky under Article III, infants, married women and those without mind to care for themselves—who have always been the natural wards of every civilized state—are "outlawed" like every one else "in a summary manner" to-wit, the manner of a highwayman, for the benefits of so-called occupants who "claim"

with or without real color of title, with any faith good or bad, and to those who claim "in privity as to the mineral or other interests" (*supra*, p. 16).

(*m*) In *West Virginia* the forfeiting acts are frankly stated by the title of the Statutes and Constitution to be intended to settle titles to land. *But in Kentucky* this Article III professes to be part of a Revenue Act, is *sandwiched in between Articles with which it is entirely inconsistent and is construed to be partly to raise revenue by the Court that almost in the same breath sustains a refusal of the County officers to permit the listing or to receive an offer to pay an amount of taxes greater than the whole annual tax derived from these counties from all other sources* (*supra*, p. 34).

(*n*) *In West Virginia* there is no provision that taxes shall be a lien for only five years and that a purchaser takes the land free from any tax that "ought to have been assessed" but actually was not, for those years. *But in Kentucky* there is (*supra*, p. 92).

(*o*) *In West Virginia* the true owner has ample time for redemption upon fair terms which is, it seems, the ground upon which this Court held in King *v.* Mullins that his title was not taken without due process of law. *But in Kentucky* his time is restricted to *the next term of the trial Court* that declares the forfeiture, which time will expire before he can have an adjudication by this Court or even by the Court of Appeals upon the question whether his title has been forfeited.

It is even doubtful whether he has any right if he has attempted to list but failed to satisfy a court by his petition, and it is certain that he has no right whatever to redeem if having listed he has failed to pay the taxes assessed within the very short time allowed therefor, and which expires before the declaration of forfeiture (*supra*, p. 14).

This shortening of the time was an essential element of the plans of the promoters of Article III; for if the time had been, as in Virginia and West Virginia, a period of five years after the enactment of the law, it was quite possible that the heirs of the patentees, although numerous, and many of them impoverished,

and scattered all over the Union, might be able to combine together to protect their interests.

(*p*) *In West Virginia* the Supreme Court of Appeals has said:

"Another element in this question is not to be overlooked. The State Constitution (Section 4, Art. 13) provides for a sale of the forfeited land, and, by Section 5 gives the owner the excess of its proceeds after paying taxes. *This relieves the forfeiture clause from the charge of being arbitrary spoliation and confiscation* of property; gives to it the hue of being only a step necessary to collect the taxes, showing that after that the State regards his right by holding in trust for him. I therefore reach the conclusion that this forfeiture clause is not repugnant to the Fourteenth Amendment." (State v. Sponagle, 45 W. Va., 415; 32 S. E., 288), and that "When in a proceeding to sell land as forfeited, there is a decree of redemption with a saving clause as to those tracts protected from the effect of redemption by Section 3, Art. 13, of the Constitution, the person redeeming, when his redemption comes in question, is not called on to prove the location of the tracts so protected before he can avail himself of his redemption" (State *v.* Jackson, 49 S. E. Rep., p. 465).

"Under the act of West Virginia of November 18, 1873, relating to sales by the state of lands forfeited or purchased at tax sales for the benefit of the school fund, the heirs of the former owner are entitled to redeem *at any time before the sale*, although the statute in terms gives the right of redemption only to the 'former owner' or an incumbrancer. Rich *v.* Braxton, 158 U. S., 375, affirming Braxton *v.* Rich (C. C., 1891), 47 Fed., 178."

So, too, in other States:

The provision of Gen. St., p. 128, Sec. 116, that land not sold by the collector for want of bidders shall be forfeited to the state, and "thenceforth all right, title and interest of every person whomsoever in and to such land or lot shall be considered as transferred to and absolutely vested in the State," does not vest an absolute title in the state, but only gives a lien for the taxes. State, to Use of Rosenblatt *v.* Heman, 70 Mo., 441.

"The forfeiture to the state of land for taxes does not so divest the owner of title as to prevent him from maintaining ejectment against one in possession not claiming title under the State. Thevenin *v.* Slocum's Lessee, 16 Ohio, 519."

The Circuit Court of the United States, in construing the law of West Virginia says:

"The aforesaid provisions of the Constitution and laws of West Virginia and the statutes of that State, so far as they purport or undertake to forfeit and divest the title of any person to his land and vest the same in any private person without provision for a sale thereof and the *return of the proceeds to such owner* after deduction of all taxes and proper charges therefrom, are attempts by said State to deprive a person of his property without due process of law, and are prohibited by the Constitution of the United States, and that there can be no valid forfeiture where such right of redemption or receipt of proceeds is prohibited or not provided for" (King *v.* Hatfield, 130 Fed. R., 564, at p. 584).

But in Kentucky the only right of redemption "provided for" by Article III verges on a mockery of justice, by offering conditions so onerous that the unhappy owners, many of them non-residents, infants, married women, would be unable to comply with the terms within the time limited, or since the lands are to a great extent adversely occupied, would give up in despair any effort to redeem their land. For the Act of 1906 requires as a condition of such redemption, that the owner should *at the next term of Court*, after the judgment of forfeiture, pay the amount of all unpaid taxes charged, "or that ought to have been charged against the defendant and those under whom he claims, as the owner or claimant of said land for the fifty years immediately preceding, together with interest thereupon at fifteen per cent. per annum from the time the said unpaid taxes were due, and the costs of the proceedings, including a reasonable counsel fee for the Commonwealth's attorney (*supra*, pp. 14–15). Although the general law in Kentucky still permits an owner to redeem his lands at any time within two years after sale to the State for taxes, and even after two years until resold by the State (Ky. Ct. App., 1909, James *v.* Blanton, 121 S. W., 951), and after two years the interest runs at the legal rate only (123 S. W., 328), and ordinarily taxes do not bear any interest before filing of suit (Louisv. & R. Co. *v.* Commonwealth, 29 Ky. L. R., 668).

(*q*) *In West Virginia*, "The levying and collecting of a tax, whether state or county, is a matter solely of statutory

creation. Such taxes are not debts; and unless they are by plain implication or expressly authorized to be assigned legally or equitably, they are incapable of assignment; *and no one can be subrogated* to the rights and remedies of the state" (Hinchman *v.* Morris, 29 W. Va., 673; 2 S. E., 863). Each title is taxed and there is no subrogation of an occupant who pays the tax to the claim and lien of the State against the true owner, and hence the anomalous doctrine of Simpson *v.* Edmiston that the State seeks to collect a full tax from as many parties as claim the title by different titles, subject to anomalous exceptions (*supra*, p. 208), has been possible, although it would seem now tottering, perhaps, to its fall (*supra*, p. 209). *But in Kentucky* the land is assessed without regard to conflicting titles, there is but one tax for the full value of the land, for which tax the legal owner, the equitable owner and the occupant, are all liable as against the State (*infra*, p. 232), and if the occupant pays he is subrogated to the State's claim and lien against the owner (*id.*, *ib.*), and whatever the rule may be in Virginia and West Virginia, in Kentucky there never has been a law by which an owner could lose his land if the taxes had been paid by any one else (*infra*, p. 227), and not a single case can be found in Kentucky to support the decision of Simpson *v.* Edmiston until the decision in the cases now at bar.

(*r*) *In West Virginia*, where lands have been sold for taxes, it has been held that the lands could not be forfeited for non-entry on the land books (U. S. Circ. Ct. App., 1898; Sayers *vs.* Burkhardt, 85 Fed. R., 246; 29 C. C. A., 137; *certiorari* denied (1899), 172 U. S., 649; and if the county official replaces such land on the land books for succeeding years and it is again delinquent and sold for taxes for such succeeding years the sale is void and the purchaser acquires no title (Totten *vs.* Nighbert, 41 W. Va., 800; 24 S. E., 627). Whether or not the first sale was valid, the true owner and the county officials until the invalidity were adjudicated would be justified in failing to list such lands until the arrears were paid. Proceedings by Commissioner of School Lands to forfeit in name of original owner where the land had been conveyed by various conveyances and once sold for non-

payment of taxes—held to be *coram non judice* and void (U. S. Cir. Ct., W. Va., 1895, Lasher *vs.* McCreery, 66 Fed. Rep., 834). *But in Kentucky* no exception from the requirement to list is made by Art. III of the Revenue Act of 1906, even although the lands have been sold to the State for taxes, in which case the Kentucky statutes forbade and declared it to be a misdemeanor to list the lands again until all arrears were paid by the owner (Ky. Stats., §§ 4073–4076, re-enacted in Revenue Act 1906, Art. II, §§ 33–36, Acts 1906, pp. 114, 115).

(*s*) *In West Virginia* a sale for taxes assessed against grantee, held not void, although such taxes were paid by the grantor, since there was no obligation on grantor to pay, and he could at any time *have had the assessment against him corrected and the sum so paid returned* (Bailey *vs.* Claugherty, 48 W. Va., 546; 37 S. E., 701). *But in Kentucky* the occupant cannot recover taxes paid. On the contrary, the occupant is one of the parties originally liable therefor to the State (*infra*, p. 231).

(*t*) *In West Virginia* the true owner is not kept away from his land by the murderous threats of so-called occupants uncontrolled and unpunished by the "police power." *But in the part of Kentucky now in question* he is and for many years past has been (*supra*, p. 56).

(*u*) *In West Virginia* the adverse occupant cannot succeed to the rights of the forfeited title unless he have color of title, nor even then if his claim "is predicated on fraud or breach of trust" (State *v.* West Branch L. Co. (W. Va.), 63 S. E., 372). *But in Kentucky* under Article III all he needs is a "*claim* or color of title derived *from any source whatsoever*" (Record No. 223, fol. 148), or to be "in privity with such person, his heirs or assigns, as to the mineral or other interests" (*Id.*, p. 149), or, in other words, to be one of the instigators of Article III.

(*v*) *In West Virginia* the forfeiting acts have been defended on the ground that "there was a reason for imposing a tax under each grant made by the State for the same land. The State herself had infused uncertainty into the land titles of the State by making more than one grant for the same land. She was

under an obligation to the man to whom she had given a junior grant to perfect his title and make it good if the opportunity ever came. Her honor was at stake. She owed a duty to her grantees in that sense. She was under a duty also, to the people generally to straighten out, as far as she might be able to do so, the tangle into which she had thrown land titles in the State" (State *v.* West Branch L. Co., 63 S. E., at p. 380). *But in Kentucky* this Article III is not for the purpose of validating a junior patent from Virginia, but is for the purpose of exterminating the titles from Virginia which Kentucky by her Compact has covenanted to hold "valid and secure" (*supra*, pp. 97-98) and of vesting the land in occupants claiming under bogus "patents" issued by Kentucky officials in the teeth of the Statutes of Kentucky under which they purport to have been made and which declares them to be absolutely null and void if the land had been previously appropriated; and which have been declared by the Court of Appeals to be "no more than waste paper" and the occupants thereunder mere trespassers (*infra*, p. 294), and which are also void under the Compact which prohibits Kentucky from making any grants that shall "interfere" with the grants from Virginia (*supra*, p. 98).

(*w*) "*West Virginia*, since its birth, before the fourteenth amendment pursued this policy, by adopting the Virginia law for the sale of lands for taxes, and after that amendment by her provision for such sale in her Code of 1868, and by the Act of March 4, 1869, forfeiting land for nonentry for taxation. Thus, in Virginia and West Virginia, these several modes of holding lands liable had become the 'law of the land' as to this matter before the amendment" (State *v.* Sponaugle, 32 S. E., 283, at p. 285; 45 W. Va., 415). And this Court, in what seems to have been a reluctant assent to sustaining the West Virginia enactments against the objections then before the Court, lays stress upon the fact that an adverse decision 'might greatly disturb the land titles of two States under a system that has long been upheld and enforced' (King *v.* Mullins, 171 U. S., at p. 422), and expressly restricts even the decision there given to the law of Virginia and West Virginia as applied in West Virginia (*Id.*, *Ibid.*). *But in Kentucky*

the titles to land originating from Virginia were protected from the outset by the Compact with Virginia as well as by the first Constitution of Kentucky which provided in Article VIII, § 7, that "the compact . . . shall be considered as a part of this Constitution"; and similar provisions have existed in subsequent Constitutions (*supra*, p. 108).

And the Court of Appeals of Kentucky has consistently and repeatedly declared unconstitutional or inoperative all prior similar attempts by the Legislature to forfeit titles to land (*supra*, pp. 118–120).

To sustain this forfeiting statute which is contrary to the traditions of Kentucky law since its birth as a State would be to make titles generally uncertain throughout the State, since almost all of the land was appropriated by Virginia surveys prior to the formation of Kentucky.

Some of the rules in West Virginia have been severely criticized by a recent decision of the highest court of that state (*supra*, pp. 207–210), and elsewhere, for instance,

"The Supreme Court of Appeals of West Virginia has gone a long way in upholding this statute in its broadest scope. They have held in State *v.* McEldowney, 47 S. E., 650, that the return of the delinquent list to a term other than the one required by law is cured by sale under this statute, and that these curative provisions apply to purchases by the state itself at tax sales; expressly overruling as to both points their prior decision in McGhee *v.* Sampselle, 47 W. Va., 352, 34 S. E., 815. *Thus the state itself is to be permitted to enforce this penalty against the private citizen arising from the misconduct of its own agents or officers.*"

Barnes *v.* Bee, 138 Fed. R., p. 481.

There is no reason for believing that the Judges of the Supreme Court of Appeals of West Virginia, although burdened with a legacy from the past and hampered by rules not of their own contriving, would have sustained a law similar to Article III of the Kentucky Revenue Act of 1906.

One of the Judges of that Court in a recent work has stated the well settled law, thus:

"If property is condemned for public use without payment of, or security for, compensation, *though in a regular proceeding in court otherwise proper*, it is a

taking of property without due process of law, contrary to the Fourteenth Amendment (Chicago, B. & Q. Co. *v.* Chicago, 166 U. S., 226, 235; Norwood *v.* Baker, 172 U. S., 269)."

"Private property is sacred. It cannot be taken from one man for the mere private use of another even with full compensation. . . .

If the condemnation is for any other than such public purpose, and is merely for the private use or convenience of another man, it is a gross violation of the Fourteenth Amendment as also of the State constitutions."

Brannon, "The Fourteenth Amendment," p. 163.

Judge Poffenbarger, President of the same Court, writing the opinion of the Court, has not only openly expressed doubts as to whether the decision in Simpson *v.* Edmiston is consonant with the Constitution, but has also severely criticised the decision in which the Judge who first declared the doctrine sought to evade its logical consequences in later cases (63 S. E., at pp. 373, 381).

And Judge Robinson, of the same Court, defends the forfeiture system mainly as having received the sanction of that Court for years and as being particularly suited to West Virginia, and says that "it must remain for another tribunal to overthrow it if that ingenious argument (of counsel) is to prevail" (State *v.* King, 63 S. E., at p. 501).

While hesitating to overthrow a doctrine so long established in West Virginia, the Court, by Judge Poffenbarger, has recently said:

"The theory of taxing and forfeiting claims to the same title, in addition to taxing the several titles, had another element of injustice and oppression in it, which cannot be imputed to any sovereign in this enlightened age. One of the ends of government is the protection of the weak against the strong. Those who are unfortunate in any respect are objects of the constant solicitude and care of a just sovereign. In every well ordered government ample means for their protection is provided, and at the public expense, if necessary. By taxing every claim to title the state would have made it necessary, when two or more persons claiming the same title were litigating over it, for each to keep the land entered for taxation, and pay the taxes on it pending the litigation, however long it might last.

The number of taxes imposed under one title would be determined by the number of claimants thereof. In some instances the taxation would be double, in others treble, and in others quadruple, and this great burden of taxation would be imposed upon these people for no conceivable reason other than that they are unfortunate enough to have a controversy about their property rights. What does it matter to the state which obtains that title? She is not in any way involved in it. She has no pecuniary interest in it, and the controversy casts no imputation upon her honor. What pretext could she assign for such conduct other than the basest of greed and avarice? Such a discrimination between that class of people and people who have no controversies growing out of wills, deeds and inheritances and the like would be most arbitrary and uncalled for. It could not be justified upon any ground, nor could any pretext be found for it having a semblance of justice or sound state policy."

State *v.* West Branch L. Co., 63 S. E., at pp. 379.

Those who wish to apply the decision in King *vs.* Mullins so as to cover if possible the case now at bar quote the sentence of the Opinion which states that "the due process of law required by the 14th amendment must mean the same in all the States" (171 U. S., at p. 422). This it is submitted, clearly means, as the context shows, that so far as the question of whether "a day in Court" is needed the law must be the same in all the States—and does not mean that forfeiting acts of the character before the Court in King *vs.* Mullins must be valid as due process of law in all the States no matter what the prior provisions of the Constitutions, laws and decisions of such other States may have been. This Court has abundantly guarded against such a construction by the express words of the opinion in King *vs.* Mullins, including the statement that the decision is restricted to the narrow question then before the Court (*Id.*, *Ibid.*).

The Constitution and Statutes of *Virginia* are not construed in the opinion. In the 6th clause of the syllabus of the report "Virginia Constitution" is a clerical or printer's error for "West Virginia Constitution," founded on a similar error at page 435 of the text of the report. The laws and decisions of Courts of Virginia, as the Court

expressly says (171 U. S., p. 410), are considered for the purpose of determining the question what the law of Virginia was at the time of the formation of West Virginia as a State, in view of the provision of the Constitution of West Virginia, that all rights and interests in lands derived from or under the laws of Virginia . . . should "remain as valid and secure and shall be determined by the laws in force in Virginia prior to the formation of this State" (*Id. ib*).

This is almost the exact language of the Compact between Virginia and Kentucky, but the criterion in the case of Kentucky is the law of Virginia at the time of the Compact (December 18, 1789), and not the law of Virginia at the formation of West Virginia (in 1863).

This Court's finding that the West Virginia Constitution, as supplemented by the West Virginia statutes, provide due "process of law" is founded, as the opinion shows, mainly on the fact that the owner is given an opportunity *to intervene and redeem* his lands on payment of the taxes and charges due (p. 436).

Article III of the Kentucky Statute of 1906 gives no such right, except at the next term of the trial court and on payment of taxes not only for the five years of delinquency but for fifty years and even refuses this right of redemption to any owner who has listed his lands and failed to pay the taxes (*supra*, p. 15).

The course of this Court in examining the law of Virginia, existing at the time when West Virginia became a State, logically requires that in Kentucky cases the law of Virginia as it existed at the time of the Virginia-Kentucky Compact of 1789 should be examined to discover the rights of true owners of Kentucky lands (*supra*, p. 170).

This Court regards the Virginia and West Virginia Statutes as intended for a lawful purpose whereas the Kentucky Act of 1906, is, in fact, and is even admitted by the Court of Appeals to be, an attempt to "outlaw" titles to lands (*supra*, p. 37), because the owners had failed to pay taxes which had been paid by adverse occupants who by express provision of Kentucky Statutes thereby became subrogated to the State's claim therefor against the

true owners (*Id.*, p. 232), and because the true owners had failed to settle upon or cultivate these lands while the animosity of adverse occupants and the lack of police protection have been such that no such settlement was reasonably possible without loss of many lives (*Id.*, p. 56).

No such conditions exist or have existed in Virginia or West Virginia; nor did the Statutes of either of these States give adverse occupants a claim over against the true owner with a lien on the land for taxes paid by occupants or attempt (as does the Kentucky Act of 1906 as construed by the Kentucky Courts) to forfeit the true owner's title if they fail to charge themselves with and pay double taxes, *i. e.*, once to refund to the occupant and once more to pay again to the State the amount of taxes already received by the State from the occupant.

As to equal protection of the laws, this Court in King *vs.* Mullins decided on this point solely that the discrimination between tracts of less or more than 1,000 acres was not a denial of equal protection of the laws. There was no other question raised on this point in King *vs.* Mullins, whereas in the now pending cases in Kentucky, plaintiff in error shows that this Article III is so discriminating and inconsistent with many other provisions even of the same Revenue Act, that the incongruity is comical and glaring (Rec. No. 223, pp. 277-279).

In King *v.* Mullins, 171 U. S., 404, the provisions of the West Virginia Constitution and statutes, which were considered, were not retroactive, and did not annex to past omissions to list a penalty which was not annexed to future omissions. Those provisions also give to persons under disability three years after the removal of the disability in which to show cause against the forfeiture.

In King *v.* Mullins, the provision for a forfeiture for the benefit of the adverse occupant was in the State Constitution and could not, therefore, be in violation of that instrument. Provision was made by which the delinquent taxpayer could intervene in a proceeding of which he was to have due notice, and redeem his land from the forfeiture, and this was held to satisfy the requirement of due process of law contained in the

Fourteenth Amendment of the Federal Constitution. Similar provisions for forfeiting lands for failure to list them and pay taxes thereon had long been a part of the laws of Virginia and West Virginia at the time the Fourteenth Amendment was adopted, and were then a part of the "law of the land" as to those States.

It being clear that a forfeiture for the benefit of the adverse occupant can add nothing to the revenue of the State, this statute, to the extent that it provides for such a forfeiture, can not be regarded as giving a remedy for the collection of taxes.

(5) The plaintiff in error has been denied due process of law and equal protection of the laws by the provisions of the Article.

(*a*) *By unconstitutional discriminations.*

Many instances in the provisions of the Article have been already pointed out in commenting on the various sections of the Article (*supra*, pp. 5–20). Some of them are stated in the dissenting opinion of Judge Hobson, who concludes his enumeration (*supra*, pp. 3–4) with the statement:

> "A reading of the article shows that it was a deliberate attempt on the part of the Legislature to deny the equal protection of the laws to the owners of the land titles referred to, and to provide as to the holders of these land titles an entirely different system from that provided for the holders of other species of property. It is, therefore, in my judgment, void both under the Constitution of this State and the Constitution of the United States.
>
> "For these reasons I dissent from the opinion of the Court" (Record, 223, fol. 321).

Many of the sections of the statutes of Kentucky referred to in the foregoing dissenting opinion will be now and here set forth, to explain more fully how Article III denies due process and equal protection, and especially in so far as needed to show forth one of the most flagrant outrages of this Article III which has been herein elsewhere referred to as being both *ex post facto* (*supra*, p. 86), and as one of the features which distinguish

that Article from the laws of West Virginia (*supra*, p. 218), to wit:

(*b*) *By unconstitutional duplicate taxation.*

A writer whose work is well known in Kentucky, who wrote before the enactment of Article III, has summarized the history of the tax laws of Kentucky as follows:

"There are, beginning with 1794, three periods in the history of these laws: First, from 1794 to 1822, when lands were liable to be sold for delinquent taxes due upon them; second, from 1822 to 1872 when they were not sold, but only 'stricken off' or forfeited to the Commonwealth; third, from 1872 to the present time, when laws for selling lands for taxes were in force, similar in their outlines to the present revenue law" (Dembitz, Ky. Jurisprudence, p. 112).

The same learned writer concludes his review with the statement that—

"*There never has been a valid law in Kentucky by which (as in Virginia and West Virginia) the true owner could lose his land by not paying taxes, as long as the taxes were paid to the State by anybody else*" (*Id.*, p. 117).

The latest general revision of the laws of Kentucky was that of the "General Statutes" of 1873, which superseded the "Revised States" of 1852, and contained a general repeal of "all statutes of a general nature in force when the General Statutes take effect and which are repugnant thereto," with a few specified exceptions, the first of which is "All statutes of Virginia or of this Commonwealth in relation to the former appropriation of the lands of this Commonwealth" (Bullitt & Feland, Gen. Statutes 1887, p. 157); the other exceptions relate to merely local statutes, some provisions of practice and similar matters having no relation to the cases now at bar.

The various editions of these General Statutes, containing also the statutes enacted since 1873, show the statutory law as it was at the time of publication. The latest of these prior to the enactment of Article III is that of Carroll, "Kentucky Statutes," 1903, which is herein-

after referred to as showing the law as it was during the five years, 1901 to 1905, prior to the enactment of the article which relates to alleged delinquencies during that period.

The Court of Appeals quotes some of the statutory provisions in its opinion, where it is said:

> " It is contended by appellant that the Act in question is vicious because it seeks to extort an unlawful duplicate tax upon the same land. In the petitions of appellant is this paragraph:
>
> ' Your petitioner is advised by counsel learned in the law and believes that in all of said years and now, under the laws of the Commonwealth of Kentucky, whenever the occupant or occupants of any part or parts of any said tracts have paid the taxes thereon, which those under whom your petitioner claims ought to have paid or ought to pay, the person so paying the tax shall be entitled to recover of the owner the amount of the tax so paid and interest, which shall continue a lien on the property upon which such tax was paid.'
>
> " The laws of the Commonwealth refered to in the foregoing statement of the petitions are as follows:
>
> ' Any person having a lien on property upon which the owner has failed to pay the taxes, and has become delinquent, such lienholder may pay the taxes, interest and penalties thereon, and shall be subrogated to the lien of the Commonwealth, county or district therefor, and the sum so paid shall bear legal interest from the date of payment, and shall be collectible in the same manner as the original claim of the lienholder.
>
> ' Wherever the occupant or tenant of any land, or bailee or person in possession of any personal property, shall pay the tax thereon which the owner ought to pay, the person paying the tax shall be entitled to recover of the owner the amount of the tax so paid, and interest, which shall constitute a lien on the property upon which such tax was paid. (Kentucky Statutes, Sections 4032, 4033, continued in force by Act of March 15, 1906, Article 11, Sections 14 and 15; Acts 1906, p. 92). (Record No. 223, fols. 180, 181.)

Of one of the foregoing sections the Court of Appeals has decided:

> Ky. St. 4032 provides that one having a lien on property upon which the taxes are unpaid, may pay the taxes and be subrogated to the lien of the State; but this does not empower the lien holder to pay all the taxes

of the owner and be subrogated to the lien of the State upon property not covered by the lien.

Allen *v.* Perrine, 103 Ky., 516; 20 Ky. L. R. 202; 45 S. W., 500.

Two more sections are quoted in another recent case in the Court of Appeals, as follows:

"Other provisions of the statutes governing the assessment of property are these: Sections 4024 and 4049, which are as follows:

"4024. All estate, real and personal, and all interest in such estate, named and specified in the tax books, shall be assessed for taxation, and the tax paid by the owner thereof to the persons authorized by law to receive the same, unless otherwise specially provided.

"4049. Real estate, or any interest therein, shall be listed in the county or district where situated, against the owner of the first freehold estate therein. If the owner fails to list the same, the assessor shall, nevertheless, list all lands in his country; and to enable him to ascertain the person in whose name to make the list, he is empowered to swear witnesses, and their statements must be put in writing and returned with the tax book, and a note or reference made in the proof in the listing of the land."

"The question of title is seriously argued. The contention of appellant is, that no matter whether the tax has been actually paid on the land, if not assessed in the name of the real owner, it may, nevertheless, be assessed in his name, and he be compelled also to pay the taxes on it. Such, however, does not seem to have been the intention of the legislature. By Section 4023, Kentucky Statutes, it is declared that the holder of the legal title and the holder of the equitable title and the claimant or bailee in possession of property, shall be liable for the taxes thereon.

"It is nowhere suggested that all of them shall be liable, whether or not any of them has paid the tax. *The object was to insure that the property paid the tax once; it was not deemed material to the State which of those made responsible for it, paid it* (*Commonwealth v. Gaines & Co., 80 Ky., 489*).

"It was held by us in Spalding, Revenue Agent *v.* O'Callaghan, 25 Ky. Law Rep., 629, in construing the last named section of the statutes, that if the State once assesses the property for a given year, and collects the taxes upon it, it cannot thereafter reassess the same property for the same year in the name of an-

other, *though the latter be the real owner, and collect the tax again.*"

Commonwealth *v.* Ingalls, 28 Ky. L. Repr., p. 166.

Other provisions of the Constitution and Statutes of Kentucky in force during the period in question are as follows:

The Constitution of Kentucky provides that

"Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation" (Const. of Ky., Section 171).

"All property not exempted from taxation by this Constitution shall be assessed for taxation *at its fair cash value*, estimated at *the price it would bring at a fair voluntary sale*" (*Id.*, Section 172).

"These provisions requiring uniformity of taxation and taxation *according to value* contain the principles that have always been recognized as the basis of taxation in Kentucky, and merely declare what has always been the law in Kentucky" (Holtzhauer *v.* City of Newport, 94 Ky., 396, 15 Ky. L. R., 188).

"All property, whether owned by natural persons or corporations, shall be taxed *in proportion* to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property" (Ky. Const., Section 174).

The Statutes prior to 1901 and continuously since have provided that

"For the purposes of taxation real estate shall include all lands within this State and improvements thereon; and personal estate shall include every other species and character of property—that which is tangible, as well as that which is intangible" (Ky. Stats. (Carroll, 1903), Section 4022).

"All taxable estate shall be assessed and valued as of the fifteenth day of September in the year listed; and the person owning *or possessing* the same on that day shall list with the assessor, and remain bound for tax, notwithstanding he may have sold or parted with the same" (*Id.*, Section 4052).

"No error or informality in the description or location of the property, or in the name of the owner or party assessed, shall invalidate the assessment if the property can, with reasonable certainty, be located from the description given; and in case of such error and informality, the sheriff may receive the taxes, and by

his receipt correct such error or informality" (*Id.*, end of Section 4056).

"All real and personal estate . . . shall be assessed at its fair cash value, estimated at the price it would bring at a fair, voluntary sale" (*Id.*, Section 4020).

"Lands shall be valued for taxation *without reference to any conflicting title*" (*Id.*, Section 4025; continued in force by the Rev. Act of 1906, Art. 1, Sections 6 and 7. This provision first appeared in the Act of January 31, 1814, 5 Litt. L., 110; (2 Moreh. & Br., 1370)).

Another Section provides that the assessor shall fix the value of the estate listed for taxation at its "fair cash value" (Ky. Stats., Carroll, 1903, Section 4053), which in itself shows that it is the land, not the title, that is taxed and taken in connection with the requirements that taxes shall be uniform (*supra*, p. 230) conforms to another section (*supra*) that the land shall be assessed without reference to any conflicting title, and shows that duplicate taxation of the same land is contradicted by the express terms of the Statutes.

Another section provides that if the Board of Supervisors found property not assessed for which they could find no owner, they should nevertheless describe and locate it and assess its value (Ky. Stats., Carroll, 1903, Section 4124).

"*The holder of the legal title and the holder of the equitable title, and the claimant or bailee in possession of the property* on the fifteenth of September of the year the assessment is made shall be liable for taxes thereon, but, *as between themselves*, it shall be the duty of the holder of the equitable title to list the property and pay the tax thereon, whether the property be in possession or not the time of the payment." Ky. Stats. (Carroll, 1903) Section 4023.

The words "owner or possessor" are used as precautionary, *to embrace both classes*, and thereby the better to secure the taxes assessed" (Head note, Johnson *v.* Smith, 68 Ky., 102).

Only two years before the opinion in Case No. 223 now at bar, the Court of Appeals said in regard to some of the foregoing sections:

"Section 4023, Kentucky Statutes, makes the holder of the legal title to land and the holder of the equitable

title also liable for the taxes thereon; 'but as between themselves, it shall be the duty of the holder of the equitable title to list the property and pay the taxes thereon, whether the property be in possession or not at the time of the payment.'

"Section 4033 provides that 'whenever the occupant of any land . . . shall pay the tax thereon which the owner ought to pay, the person paying the taxes shall be entitled to recover of the owner the amount of the tax so paid and interest.'

"Section 4035 gives a right of action to a joint owner who pays all the tax where the property has been 'assessed conjointly.'

These sections were intended to fix the liability for the tax as between the persons *prima facie* liable therefor, and *from any of whom the State may have exacted its payment.* The payment of taxes is generally involuntary; its assessment and the means of collection are necessarily more or less summary; that a mere volunteer who pays the taxes of the owner of property will not be given either a lien on the property or a right of action to recover the amount paid from the owner is well settled, but where *one who can be made to pay it* does so, the statutes fix the *ultimate* liability *as between the persons liable,* and give a *right* of *action against such one* in favor of the other who pays."

1904, Montgomery *vs.* Montgomery, 25 Ky. L. Repr., 1683.

"Appellee does not contend that the State did not have the right to have the property assessed and subjected to taxation once. . . . It is the double taxation which they object to. In our opinion it is a sound one, and the State is estopped by the judgment they procured in the Daviess Circuit Court" (Spalding *v.* O'Callaghan, 25 Ky. L. Repr., 629, 632).

"Any person having a lien on property upon which the owner has failed to pay the taxes, and has become delinquent, such lien holder may pay the taxes, interest and penalties thereon and shall be subrogated to the lien of the commonwealth, county or district therefor, and the sum so paid shall bear legal interest from the date of payment, and shall be collectible in the same manner as the original claim of the lien holder" (Ky. Stats. (Carrol, 1903) Section 4032, incorporated in the Rev. Act of 1906, Art. 1, Section 14).

Under the Statutes of Kentucky a purchaser at a void tax sale is entitled to a lien by substitution for the price to

the extent that taxes were a lien on the land sold, and also for his improvements and other expenses relating to the care of the land (Fish *v.* Gennett, 22 Ky. L. R., 177; McFerran *v.* Wilson, 2 *Id.*, 220; Wheeler *v.* Bramel, 10 *Id.*, 301; Nat'l. Bk. of Commerce *v.* Licking Valley, &c., Co., 15 *Id.*, 211; Tydings *v.* Rogers, 14 *Id.*, 142; Hamilton *v.* Steele, 117 S. W., 378).

Other provisions of the Kentucky statutes are:

"Sec. 4073. "That it shall hereafter be unlawful for any assessor of this State to list any land owned by non-residents of this State that have heretofore been sold or that may hereafter be sold, and purchased by the State for taxes due thereon, except as hereinafter provided."

"Sec. 4074. That the owners of all such land that has heretofore been sold, or may hereafter be sold and purchased by the State for taxes due thereon, shall be required to pay, in addition to the amount said lands were sold for, all taxes accumulated thereon after the sale of the same to the date of the redemption, to the officers now required by law to receive it"

"Sec. 4075. That whenever the owners of said lands shall redeem same, as provided in Section 4074 of Article 2 of this Chapter, it shall be the duty of the Clerk of the County Court to certify said redemption to the assessor of the county, whose duty it shall be to list the same for taxation."

Notwithstanding all these provisions the framers of Article III being well aware that taxes on all or almost all these lands had been paid by occupants or other claimants, saw that there was no hope of effecting their object of forfeiting the title of the true owner and vesting it in themselves, unless the true owners were compelled to list their lands a second time in their own names and to pay again to the State taxes on such lands, although the taxes for the same years on the same lands had been already paid to the State by occupants who had been subrogated to the State's claim against the true owners. The promoters of this Article therefore inserted the following provision, which did not exist in the prior statutes and is not now contained in any part of the Revenue Act of 1906, except in Section 1 of Article III, which relates

solely to alleged delinquencies for years *preceding* the enactment (*supra*, p. 6).

"The fact that said land has been listed for taxation, or the taxes have been paid thereon, by another claimant shall not relieve against the duty herein imposed" (*supra*, p. 6).

The conditions regarding the payment of taxes on these lands are very similar to the conditions in an adjoining county, which the Court below some years ago described as follows:

"The sheriff and his deputy testify on cross-examamination that a great deal of the land so listed to non-residents was in fact occupied and claimed by residents of the county who listed them for taxation, and actually paid the taxes thereon.

"The County Court Clerk also testifies that these lands were occupied by residents who claimed to own them, and who paid the taxes on them. With a knowledge therefore that the taxes on the *lands* offered for sale *had already been paid* by those in possession of them, it was not the duty of the sheriff to advertise and sell them.

"It also appears that the same tract of land was often listed in the name of a number of *different owners*, and while the sheriff was not at fault for this, yet it does not follow that he must go through the *farce* of attempting to sell under such an *irregular* assessment.

"We agree with counsel that there is nothing in the record to impeach the good faith of the sheriff in making the sale, but the startling fact remains that the lands offered for sale by him were valued at $3,808,778.

"The assessment was at the rate of $5 per acre, so that the number of acres sold was 777,555.

"This does not quite reach the total acreage of the county, but it is sufficiently close to it to induce an ordinarily observant officer to suspect the existence of gross irregularity at least in the assessment.

"The sheriff had nothing to do with all this, it is said, but it is evident that, upon suggesting this singular condition of things to the County Court, or the commissioners authorized to make a settlement of his account, proper exonerations must have been allowed him.

1895, Minix *vs.* Magoffin Co., 17 Ky. L. Rep'r, 628.

Under such conditions it is clear that Article III was

seeking to forfeit titles for failure to pay taxes twice on these lands not authorized by law.

In the words of a distinguished text writer:

"It is a fundamental maxim in taxation that the same property shall not be subject to a double tax, payable by the same party *either directly or indirectly;* and when it is once decided that any kind or class is liable to be taxed under one provision of the statutes, it has been held to follow, as a legal conclusion, that the legislature could not have intended the same property should be subject to another tax, though there may be general words in the law which would seem to imply that it may be taxed a second time."

Cooley on Taxation, 398, 399.

The Court of Appeals, referring to and citing the foregoing statement, said:

"We approve of this rule of construction and refer to it for the purpose of showing how duplicate taxation is regarded by the courts, and their reluctance to sanction laws expressly providing for it; but we do not feel at liberty to adopt in this case the legal conclusion that double taxation was not intended by the Legislature, because if it is not required in express words of the law, it is by necessary implication, and it therefore becomes our duty to pass upon the validity of the statute." Held that the statute was unconstitutional.

Livingston *v.* City of Paducah, 80 Ky., 656, 659; cited, approved and followed in Standard Oil Co. *vs.* Commonwealth, 26 Ky. L. R., 985.

After the Court of Appeals had declared that the Act of 1825 and other attempts of the Legislature to forfeit the title of the true owner for failure to list were invalid exercises of power, the Legislature had the alternative either (1) to proceed in a constitutional manner, making the act prospective only, and to relate to taxes for the years following the enactment and by providing for fair notice to the true owner and an opportunity to him to defend, in which event he could have protected himself by showing that the taxes on much or all of his land had been paid by occupants and claimants who, under the statutes of Kentucky, had been subrogated to the Commonwealth's claim therefor; or (2) to receive the payment of the taxes from occupants and leave the latter to adjust

their claims amicably or by proceedings in the courts against the true owner for taxes so paid by them. (Thus in an ejectment suit—the improvements and *taxes paid* by the adverse occupant should be offset against the rents. See, for instance, 1901, Fain *vs.* Miles, 22 Ky. L. R., 1584, 1586).

For over three-quarters of a century (since the Act of 1825) no one has sought to forfeit the true owner's title for failure to list lands that were listed by adverse claimants. Article III of the Revenue Act is an attempt not merely to reverse this long settled policy but to make such reversal retroactive and to enable the officers of the Commonwealth to collect a second time a claim against the true owner that the Commonwealth has already assigned to the occupants of his land.

A sale for taxes is void if the amount of the tax is excessive even for a small part only.

1900. Fish *vs.* Gennett, 22 Ky. L. R., 177, citing and following
Smith *vs.* Ryan, 88 Ky., 636;
Black on Tax Titles, Section 97.

A fortiori an attempted forfeiture for failure to list for more taxes than are due should be void for the same reason.

The laws of Kentucky taxing the land itself are not anomalous like the law of West Virginia which under the rule in Simpson *vs.* Edmiston, taxes each conflicting title at the full value of the land.

In *Witherspoon* vs. *Duncan*, this Court, by Mr. Justice Davis, said:

"Arkansas has the right to determine the manner of levying and collecting taxes, and can declare that the particular tract of land shall be chargeable with the taxes no matter who is the owner, or in whose name it is assessed and advertised, and that an erroneous assessment does not vitiate a sale for taxes" (*4 Wallace 210, at p. 217*).

"The State may declare that property shall be chargeable with taxes, no matter who is the owner or to whom it is taxed. It is usually required that property be taxed against the owner or occupant. And in case of a reasonable doubt as to the ownership, it may be

charged to unknown owners or to persons unknown" (*25 Am. & Eng. Ency. at p. 119*, citing many cases in many States).

"The tax lien attaches *to the land itself*, and not to any particular interest therein, and may be valid although the tax is assessed to the wrong person (25 Am. & Eng. Enc., 1st ed., p. 268).

Unless the statute expressly provides otherwise a lien for taxes attaches to the land irrespective of ownership (Osterburg *v.* Union Trust Co., 93 U. S. 424).

Property may be assessed to the possessor or person in charge or control, and he will be personally liable for the tax and the property will be liable also (People *v.* Rains, 23 Cal., 131). The rule that a person in possession of land claiming it as his own should pay the taxes and can acquire no outstanding title by allowing the land to be sold for taxes and purchasing at the sale, is the same, though the possession may be such that it would give the possessor title by Statute of Limitations (Barret *v.* Amrein, 36 Cal. 322). Where lands are occupied the occupant to whom the lands have been assessed in accordance with the requirements of the statute owes a duty to the State to make payment; and the owner of lands unoccupied owes to the State a like duty (Blackwood *v.* Van Vleit, 30 Mich. 228). The party enjoying the present use of land is liable for the taxes thereon unless the language of the statute imposing the tax be repugnant to such liability (Sprangler *v.* York County, 13 Pa., (1 Harris, 322). Cultivation of land without residence gives character and denomination for the purpose of assessment of taxes, nor is it material in a question of denomination that the cultivator is an intruder. With the actual owner the assessor has nothing to do, it being sufficient for his purpose that there is an occupant personally responsible for the public charge (Pa. 1871. Arthurs *v.* Bascom, 28 Leg. Int., 284).

But the statutes of Kentucky in so far as they subrogate the occupant to the claim and lien of the State against the owner, change the law from what it would otherwise be. Taxes are not debts and unless by plain implication or express declaration authorized to be assigned they cannot be assigned and no one can be subrogated to the rights and remedies of the State (Hinchman *v.* Morris, 29 W. Va., 673; 2 S. E. 863); and the general rule is that an adverse claimant who even in good

faith volunteers to pay taxes which the true owner has neglected or refused to pay, is not entitled to be subrogated to the claim of the State, nor to be reimbursed, and has no claim therefore either upon the land or against the owner. (Iowa Homestead Co. *v.* Des Moines Nav. Co., 17 Wall., 153). A lien created by the terms of a statute authorizing the assessment and collection of a tax exists and attaches only according to such terms and conditions as are prescribed by the statute creating it. (Lyon *v.* Alley, 130 U. S., 177). Unless the statutes expressly provide therefor, one who voluntarily pays a tax cannot recover it back on subsequent failure to maintain title in the thing taxed. (Litchfield *v.* Webster County, 101 U. S., 773). Nor if the tax is afterwards declared illegal. (Lamborn *v.* Dickinson County, 97 U. S., 181).

Unless there is a lien by the State for taxes one who has paid taxes due by another cannot thereby make the latter his debtor. (Leach *v.* Kendall, Ky., 13 Bush., 424).

In Kentucky this subrogation is confined to the occupant or lienor as provided by the Statutes and does not extend to the sureties of a Sheriff who pay the amount of the tax to the Commonwealth before collecting from the owner (Jones *v.* Gibson, 82 Ky., 561).

After quoting Sections 4032, 4033 of the Ky. Statutes (*supra*, p. 232), the Court of Appeals in the case at bar says:

> "There is no such connection or privity between adverse claimants of land as entitles one to recover taxes voluntarily paid by him on the land, although he in fact did not own it, from another who did own it but failed to list it and pay the taxes" (Record No. 223, fol. 182).

The theory of the Court of Appeals that the tax is on each conflicting title to the land and not on the land itself is, it is respectfully submitted, a new doctrine to which the Court attempts to give an *ex post facto* application by basing upon it a confiscation of titles and is contradicted:

(1) by the Constitution of the State,

(2) by the Statutes of the State existing for many years prior to the Act of 1906,

(3) by other Articles of the Act of 1906,

(4) by Article III itself, and
(5) by many decisions of the Court of Appeals prior to (and some since) the decision against the plaintiff in error.

As already stated the Court's assertion that the provision that

"The fact that said land has been listed for taxation or the taxes have been paid thereon by another claimant shall not relieve against the duty therein imposed" existed under the General Statutes is destitute of the slightest foundation in fact (*supra*, p. 6).

The contention of the Court below that it is the "property of the claimant—not the land" that is taxed (Record No. 223, fol. 182), although contradicted by the express words of the statutes and the prior decisions of the Court (*supra*, pp. 229–232, 243), seems at best, it is respectfully submitted, quite irrelevant. The question is not whether, according to the theories of jurists, the property in land and not the actual land itself ought to be taxed, or whether in the opinion of grammarians the legislature should use words with the meaning of jurists. It is plain from the statutes that the legislature thought it was taxing the physical land; for in the same sentence it speaks of the "improvements *thereon*," to wit, the land (*supra*, p. 230).

Even if the right to the land, instead of the land itself, were what the Legislature of Kentucky had authorized to be assessed, it would not help this act. For it is of the essence of "property" to be exclusive. This is shown not merely by the etymology but by all the uses of the word. The State recognizes only one right of property in the thing. What the State (or rather the Court of Appeals) is seeking to do is to tax two or more *claims*, while it recognizes and protects but one *right* of property. This is part of the essential viciousness of the West Virginia doctrine announced in Simpson *v.* Edmiston and which the Court of Appeals seeks now to adopt, but which the West Virginia courts afterwards refused to carry out to its logical conclusion (*supra*, p. 207). But the Court of Appeals of Kentucky seeks to do more, to wit, not only to impose full taxes on each of two con-

flicting claims, but to saddle them both on the true owner if an adverse occupant or lienor has paid, and then to forfeit the true title for failure of the true owner to pay both taxes; and to do this *ex post facto*, and also in violation of Kentucky's Compact with Virginia, and by methods of procedure that would be denials of due process and equal protection even if the statute were valid; all this being in as many ways violations of the National Constitution, as well as of that of Kentucky from which the Court purports to derive its powers to make the decision.

Again the Court says:

"The statute quoted above, and relied on by appellant, at the utmost, would not give a claimant of land who paid taxes on it, a lien as against the true owner, if the latter also paid. When the Legislature requires the true owner to list and pay taxes on his claim, it is *therefore*, no defense under this statute that another (a stranger to the title) has listed them and paid the taxes, and would have a right of action to recover for them if the State did not collect them from the true owner (Simpson *vs.* Edmiston, 23 W. Va., 675.)" (Record No. 223, fol. 186).

To which the petition for rehearing:

"The conclusion here drawn does not seem to be a logical child of the premises, and the authority cited is not law in Kentucky, and even in West Virginia where it is followed, it has been called 'somewhat anomalous' (State *vs.* Harman, 50 S. E., 828, at p. 832). . . . no holding of the same character, it is submitted, can be sustained regarding lands in Kentucky, which are assessed for full cash value without regard to conflicting title and where the occupants and lienors paying the tax are subrogated to the State's claim against the true owner" (Record No. 223, fol. 271, 272).

Continuing, the Court below said:

"The State is interested not only in having its taxes paid to it, but in having them paid by the persons who ought to pay them. The fact that the State makes a claimant in possession—though not having the best title—pay taxes upon his property, that is, his claim, does not exhaust the State's power to compel any other claimant of a title to the same land to list his claim and pay taxes upon it." (Record No. 223, fol. 184.)

This, it is submitted, is one of the many declarations in this opinion of new doctrine that flatly contradict the Court's own prior decisions in other cases (cited *supra*).

"The object was to insure that the property paid the tax once; *it was not deemed material to the State which of those made responsible for it paid it*" (Commonwealth *v.* Ingalls, 28 Ky. L. R., 166, citing Commonwealth *v.* Gaines, 80 Ky., 489).

The State's only concern is to collect the money that each tract of land should yield in revenue to the State. It ought not to be interested in an attempt to collect the money twice.

"The payment of taxes by any person extinguishes them (Morrison *vs.* Kelly, 22 Ill., 610). And see Wilbert *v.* Michel, 42 La. An., 853. See also Mason *v.* Chicago, 48 Ill., 420, where taxes on land were paid by mistake by one not the owner, who, on discovery of the error, got the money refunded, but it was nevertheless held to operate as a payment."

"As the duties of tax officers are ministerial they cannot decide upon the claim of one offering to pay a tax and claiming to have an interest in the land, but must accept payment (Iowa, R. L. Co. *v.* Guthrie, 53 Iowa, 383)."

25 Am. & Eng. Enc. (1st Ed.), 280—note.

Tax Commissioners have no right to establish a rule that they will receive taxes from no one but the owner in person and thus cut off title by sale which would not have been necessary had the owner's agent made tender of the amount of tax which he refrained from doing because of the rule (25 Am. & Eng. Enc., 280, citing U. S. *v.* Lee, 106 U. S., 196; Bennett *v.* Hunter, 9 Wall. (U. S.), 326; Tracey *v.* Irwin, 18 Wall. (U. S.), 549; Atwood *v.* Weems, 99 U. S., 183).

And a writer quoted by the Court of Appeals on another point in its opinion says:

"Whether any third person may make payment is not so clear; but *as the state is interested only in obtaining the revenue it has called for*, it would seem that, before any sale, and consequently before any rights of third parties have intervened, any mere volunteer may pay the tax if he chooses, and the payment would be

effectual, so far, at least, as to terminate the lien of the tax upon the land, though, if the statute undertook to give the person making the payment rights in the land by reason thereof, the payment might not be effectual to confer such rights, for no one can assume to stand in the place of the owner for the purpose of performing an act which the owner himself sees fit not to perform, and claim thereby to establish rights against the owner or his property by what, under such circumstances, would be an officious intermeddling. It has therefore been held that the lien which the statute gives to one who pays a tax on land attaches only in case the person paying had an interest, either personally or as agent, though if he were a mere intermeddler, and the owner should subsequently claim the benefit of the payment, there would be no injustice in holding that he thereby adopted the act of payment with all the statutory consequences. The officer who received the payment would himself be precluded from raising any question of its sufficiency." (Cooley on Taxation, pages 803, 804.)

The Court of Appeals says;

"Double taxation is not *per se* unconstitutional. It is only when taxes are imposed twice by the same government, upon the same property as against the same owner that they are inhibited, and then only by virtue of the clause in the Constitution which requires all taxation to be uniform. It is only when there is a destruction of uniformity by virtue of the so-called double taxation that it is prohibited." (Record No. 223, fols. 183, 184).

This, it is respectfully submitted, does not meet the question and is irrelevant. But in the cases at bar there is the most monstrous "destruction of uniformity."

"The scheme of taxation adopted in this state seeks to avoid double taxation, not only in not taxing the same property twice in the same year for the same purpose, but in *not taxing the same thing twice* whatever its form; double taxation being recognized as oppressive and vicious."

Head-note Ky. Ct. App., 1909, Commonwealth *v.* Walsh's Trustee, 117 S. W., 398.

In the opinion in the last cited case the Court says:

"Throughout the whole scheme of taxation adopted by this state there is an evident purpose to avoid double taxation, not alone in not taxing the same property

twice in the same year for the same purpose, but as well in not taxing the same thing, whatever its form, twice in the same year, for the same purpose. Double taxation is recognized as oppressive, and, where it is imposed upon some classes of property and not upon others, works an inequality that is fundamentally vicious. . . . . *When the thing itself is taxed at its full value, every element of it is made to bear the tax.* . . . . . *the general course is to lay the tax upon the thing itself, whether land,* chattel, chattel real, or chose in action, without noticing the various minute subdivisions of property that may be carved out of or imposed on the thing upon the notion that property for purposes of taxation is the sum of its various estates and rights.

Commonwealth *v.* Walsh, 117 S. W., at p. 399.

Whether or not the officers of a Commonwealth have the right to refuse to receive payment of the amount of a tax from a mere stranger, if they receive it the tax is discharged and the Commonwealth cannot afterwards question the payment nor assess and collect the same tax again, nor sell or forfeit the land for non-payment.

Ohio Railroad L. Co. *v.* Guthrie, 53 Iowa, 383;
Hudson *v.* People, 188 Ill., 103;
Graham *v.* Florida L. Co., 33 Fla., 356;
Nickim *v.* Gaston, 28 Oregon, 322.

Land having been assessed for the same year to two different persons, by one of whom the taxes were paid, the State acquires no title by a forfeiture for non-payment of taxes levied on the other assessment, and can transfer none, though the unpaid taxes were assessed against the holder of the record title, and the person by whom the taxes were paid had no record title, and *was not, in fact, the true owner;* and the one who paid the taxes being in possession, he may have the tax sale set aside as a cloud on his title (Wilbert *v.* Michel, 42 La Ann., 853; 8 South., 607).

(c) *By allowing a hearing upon the claim of unconstitutionality only at the risk if mistaken of being subjected to confiscation of its whole property.*

It has been already shown that the Article required the listing prior to January 1, 1907, a few months after it

In declaring another statute to be unconstitutional the Court of Appeals of Kentucky said:

"The forfeiting act passed in January, 1824, and the improvement was required to be made on or before the 1st of August, 1825. At both periods the land in contest was in the adversary position of Buford. It is believed that no degree of diligence would have enabled Gaines to have got into possession under a judgment in ejectment, and made the required improvement within those periods, *provided the case had been appealed to this Court.* If this be the fact, then the Act is obnoxious to censure as repugnant to the spirit of that clause of the Constitution which prohibits the passage of *ex post facto* laws. Prior to this Act, there was no law requiring the improvement to be made or prescribing a penalty for not improving. *If then, sufficient time was not allowed* Gaines to turn the occupants out of possession by due course of law, and make the required improvement, it was *the same to him, in effect, as if the act had allowed only a day, or no time at all for making it.* An act of the latter description, though it might not fall literally within the definition of an *ex post facto* law, yet it would come fully and completely within the reason and policy of the inhibition against the passage of such laws" (Gaines *v.* Buford, 31 Ky. (1 Dana), at p. 508).

(6) The plaintiff in error has been denied due process and equal protection of the laws by the proceedings to construe and enforce the Article, even if the Article were in any respect valid.

Instances of denial of due process and equal protection by the Courts in addition to those shown in the Article itself are:

(1) The construction by the Courts of the Article as intended to "outlaw" the titles of plaintiff in error, under the guise of a revenue act; (*supra*, pp. 37, 41); (2) the concurrence of the Courts with the strenuous opposition of the County officials to defeat the attempt to list the lands (*supra*, pp. 31, 38-59); (3) the denial and dismissal of the petitions to list without stating the reasons or giving a chance to amend (*supra*, p. 59); (4) the refusal of the offer to pay taxes (*supra*, p. 34); (5) the needless and unwarranted aspersions upon the character and motives of the patentees and those deriving title from them

(*supra*, pp. 38–40); (6) the unfounded statement of the character of the laws of Virginia and West Virginia (*supra*, pp. 40, 210); (7) the construction of the Compact contrary to prior decisions of the Court (*supra*, pp. 111, 116, 119); (8) the construction of the Constitution and laws regarding unconstitutional duplicate taxation contrary to many other decisions of the Court (*supra*, p. 41, and p. 227); (9) the overruling of the objections to the *ex post facto* character of Article III, especially as related to the plaintiff in error, a subsequent purchaser, contrary to the constructions of the Constitution and Statutes and many prior decisions of the same Court (*supra*, pp. 41, 79–82); (10) the brushing aside of the various objections that the Article imposes pretended duties impossible to be fulfilled within the time allowed therefor, and attempts to forfeit land for failure to comply and without regard to innocence, and is not for a public object, nor for lawful public benefit, but for unlawful private emolument; and is an act of spoliation and lawless confiscation and is revolutionary and subversive of all constitutional and orderly government (Record No. 223, fol. 304); and attempts to abdicate and repudiate the office of the Commonwealth as protector of the rights and interests of infants, married women, the insane and non-residents with the assertion by the Court that "there is abundant basis for the Act in which it will appear not only as reasonable but as highly politic" (*Id.*, fol. 189); (11) the erroneous statement of fact regarding a very important provision of Article III, asserted by the Court to have existed in the prior statutes, and the refusal or neglect of the Court to retract the statement (*supra*, p. 6); (12) the unwarranted grounds on which the petitions to list were dismissed by injecting into the petitions a statement that was not there (*supra*, p. 43), and adding to Article III a requirement that is not there (*supra*, p. 44); and contradicting or overruling the Court's prior decisions and other provisions of Article III and of other Statutes of Kentucky (*supra*, p. 45); and forfeiting the title of plaintiff in error for failure to make under oath a claim contrary to

truth and justice and against the Statutes of Kentucky and prior decisions of the Court (*supra*, p. 47); and refusing to accept the plea of the existence of murderous outlaws who would have prevented the surveys although the same plea had been accepted by the Court in the much less serious case a few years earlier (*supra*, p. 56); (13) the unlawful discrimination against plaintiff in error in favor of a co-defendant (*supra*, p. 52); (14) the striking out from the original answer in Case No. 224 of the allegations of the proceedings in the prior case No. 223 of the attempt of plaintiff in error to list its lands and the refusal of the Court to permit the same to be read to the jury (*supra*, p. 65); (15) the striking out from the original answer of plaintiff in error of the allegations of conspiracy by the instigators of Article III (*supra*, p. 62); (16) the refusal to allow the amended answer to be filed, such refusal being contrary to the practice of the Court in other cases (*supra*, p. 65); (17) the ignoring both by the trial Court and the Court of Appeals of the defences set up in the amended answer (*supra*, p. 70); (18) the statement by the Court as a fact that those from whom plaintiff in error deprived title had not paid taxes since 1825 whereas there was no evidence whatever thereof before the Court, all evidence relating thereto having been stricken out by the trial Court (*supra*, p. 71); (19) the discrimination against the plaintiff in error by the rulings of the Court in order to sustain the declaration of forfeiture against plaintiff in error as compared with the rulings of the same Court in other cases on the questions of what is due process of law (*supra*, p. 199), and what constitutes an unconstitutional violation of contracts (*Id.*, p. 181), and upon the limits of the revenue power (*infra*, pp. 259–261), and of the "police power" (*Id.*, pp 276–9; 283–7).

Although the Kentucky Court of Appeals is now deprecating as "not tolerable" (Record No. 223, fol. 188) an interference with an atrocious act of its legislature and sustaining an enactment whose purpose avowedly is to "outlaw," *i. e.*, confiscate the titles of plaintiff in error,

the same Court in the past has been diligent in enforcing the provisions of the Federal Constitution even to the extent of declaring an Act of Congress aimed at Confederate soldiers to be void as depriving of property without due process of law (1863—Norris *v.* Doniphan, 61 Ky. (4 Metc.), 385); and another Act of Congress to be void as taking private property in slaves without just compensation (1865, Corbin *v.* Marsh, 63 Ky. (2 Duv.), 193).

All of which it is respectfully submitted support the contention that "a day in Court" does not necessarily ensure due process or equal protection.

(7) Article III and the proceedings thereunder are not a constitutional exercise of the power of taxation.

The discussion of this point by the Court is contained in the Record No. 223 (fols. 184–187).

The remarks of the Court regarding the power of state to forfeit for failure to comply with its tax laws, and that Article III gives the victim a day in court, seem (be it respectfully submitted) quite irrelevant.

The plaintiff in error is not seeking to avoid payment of taxes, nor is it contending that Kentucky had no power to enact any valid act forfeiting titles for failure to comply with tax laws; but it claims that Article III is not such a valid act and that its execution is unconstitutional, for reasons specifically stated to the Court below.

One of the most serious mischiefs intended to be remedied by those who framed and adopted the XIVth Amendment was the *abuse of the taxing power* by any and all of the officers of a State, whether executive, administrative, legislative or judicial (*supra*, pp. 192–5).

This Article III., as attempted to be enforced against appellant, is not really intended to raise revenue, but even if it were, it would be a nullity:

"The revenue system must yield to the contract which the State has lawfully made, and the obligation of which, by the Constitution, it is forbidden to impair."

Poindexter *vs.* Greenhow, 114 U. S., 271.

The first section of the Fourteenth Amendment of the Constitution of the United States places a limita-

tion upon all the powers of a state, including, among others, that of taxation. Central of Georgia R. Co. *v.* Wright, 207 U. S., 127, 142.

"There are limitations of such powers, which arise out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.

"Among these is the limitation of the right of taxation, that it can only be used in aid of a public object, an object which is within the purpose for which governments are established."

Loan Association *vs.* Topeka, 20 Wall, 654.

"The Federal courts throughout the country have frequently reviewed the action of taxing bodies when, under the facts, such action was in effect the action of the State, and, therefore, reviewable by the Federal courts by virtue of the provisions of the amendment in question (see Nashville, C. & St. L. R. Co. *v.* Taylor, 86 Fed., 168; Louisville Trust Co. *v.* Stone, 46 C. C. A., 299, 107 Fed., 305). In the last case, which related to enjoining the collection of alleged illegal taxes by reason of discrimination, the Court said: 'It may be conceded that, if the allegations of the bill are made out, there exists, in respect to the property of complainant and others similarly situated, a systematic, intentional, and illegal undervaluation of other property by the taxing officers of the State, which necessarily effects an unjust discrimination against the property of which the plaintiff is the owner, and a bill in equity will lie to restrain such illegal discrimination, and that in such cases Federal jurisdiction will arise because of the equal protection of the laws guaranteed by the 14th Amendment. The same principle has been recognized in Reagan *v.* Farmers Loan & T. Co., 154 U. S., 362, 390; A. Backus, Jr., & Sons *v.* Fort Street Union Depot Co., 169 U. S., 557, 565; Fargo *v.* Hart, 193 U. S., 490, 502."

Opinion of the Supreme Court of the United States by Mr. Justice Peckham, in

Raymond *v.* Chicago Union T. Co., 207 U. S., at p. 36.

Where it was shown that the tangible taxable property of all kinds subject to equalization by the State Board of Equalization under the laws of Kentucky, which con-

stituted 77 per cent. of the taxable property of the state, was assessed for the year 1902 at not to exceed 80 per cent. of its fair cash value by the local assessing officers and the Board of Equalization, a railroad company whose intangible property was assessed by the Board of Valuation and Assessment at its full cash value is entitled to maintain a suit in equity in a federal court to enjoin such board from apportioning and certifying for collection so much of the tax as is in excess of that imposed on other taxpayers, as in violation of its constitutional right to the equal protection of the laws. Coulter *v.* Louisville & N. R. Co., 196 U. S., 599, reversing 131 Fed., 282.

Where the state reserved the power to alter, amend or repeal a statute constituting a contract with a corporation exempting it from ordinary taxes, the passage of a statute thereafter which attempted to preserve all the obligations of the corporation in favor of the state, but to take away from the corporation the consideration on the part of the state on which the duty of the corporation to pay a gross receipt tax rested, was invalid, as denying such corporation the equal protection of the laws. Duluth & I. R. R. Co. *v.* St. Louis County, 179 U. S., 302, reversing 77 Minn., 433, 80 N. W., 626.

Where an attempt was made by proceedings in court, an assessment by jury confirmed by the Court, to exact from an owner of land the cost of a public improvement in substantial excess of the special benefits accruing to him, held that it was, "to the extent of such excess, a taking under the guise of taxation of private property for public use without compensation" (head-note) and should be enjoined, notwithstanding that the village contended "that the appropriate proceedings and consequent assessment were all in strict conformity with the laws and statutes of Ohio and in pursuance of due process of law" (172 U. S., at p. 276), and in the course of the opinion this Court, by Mr. Justice Harlan, said:

"It has been adjudged that the due process of law prescribed by the (Fourteenth) Amendment *requires compensation to be made* or secured to the owner when private property is taken by a State or under its authority for public use (Chicago, Burlington & Q. R.

Co. *v.* Chicago, 166 U. S., 226, 241 (41 L., 979, 986); Long Island Water Supply Co. *v.* Brooklyn, 166 U. S., 685, 695 (41 L., 1165, 1168) . . . the power of the legislature in these matters is not unlimited. *There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property.*"

Norwood *v.* Baker, 172 U. S., 277, 278.

"The provisions of the Federal Constitution forbidding any State to deny to any person within its jurisdiction the equal protection of the law forbid unequal exactions of any kind, among them that of unequal taxation."

25 Am. & Eng. Encyc. of L. (1st Ed.), 54, 56.

"The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power are matters which, like questions of commercial law, no State court can conclusively determine for this Court" (Olcott *v.* Supervisors of Fond du Lac Co., 83 U. S., 678). "What is or is not a public use" (justifying taxation) "is a question of general jurisprudence which the Federal courts will determine for themselves" (McGehee, Due Process, p. 230, citing Fallbrook Irrigation Dist. *v.* Bradley, 164 U. S., 112; S. P., 25, Am. & Eng. Enc. L., p. 89, note, citing Olcott *v.* Fond du Lac County, 16 Wall., 178.

"The rule that the construction of a State statute by the highest Court of the State is conclusive on a Federal Court does not apply where a Federal question is involved, as where a complainant contends that it acquired contract rights under such statute which are protected from impairment by the Federal Constitution."

Head note, U. S. Circ. Ct., 1908; Sunset Tel. & Tel. Co. *v.* City of Pomona, 164 Fed., 561.

In the last cited case the Court refused to be bound by a decision of the highest court of California construing a penal statute of the State in accordance with the rule declared by another statute attempting to abolish the common law rule that penal statutes should be strictly construed, and cited

Ohio Life Ins. & Tr. Co. *v.* Debolt, 57 U. S., 416, 432, 433; Jefferson Branch Bank *v.* Skelley, 66 U. S., 436, 443; Bridge Proprietors *v.* Hoboken Co., 68 U. S., 116,

145; L. & N. R. R. Co. *v.* Palmes, 109 U. S., 244, 256, 257; Vicksburg, etc., R. R. Co. *v.* Dennis, 116 U. S., 667; Shelby County *v.* Union, etc., Bank, 161 U. S., 149, 151.

"It was not necessary to the complainant's cause of action that the Assessor or the County Commissioners should have had any actual intention to increase unduly the complainant's share of the burden of taxation. It was sufficient to sustain its cause that they intended to disregard the law, and that the natural and inevitable effect of that violation was the increase of its share of the burden (Taylor *v.* Louisville & N. R. Co., 31 C. C. A., 537, 559; 88 Fed., 350, 372). . . . A systematic and intentional under or over assessment of one or more classes of property in violation of the law, whereby one or more classes of property is to be made to bear an undue proportion of the burden of taxation, presents a good cause of action for relief from the payment of the unjust part of the proposed tax" (Taylor *v.* Louisville & N. R. Co., 88 Fed., 350, 372; 31 C. C. A., 537, 559; Cummings *v.* National Bank, 101 U. S., 153, 158; Raymond *v.* Chicago Traction Co., 207 U. S., 20, 37, 38; Pittsburgh, Cincinnati, Chicago & St. Louis R. Co. *v.* Backus, 154 U. S., 421, 425, 435; Cummings *v.* National Bank, 101 U. S., 153, 158; 25 L. Ed., 903; Raymond *v.* Chicago Traction Company, 207 U. S., 20, 36, 37; 28 Sup. Ct., 7, 52, L. Ed., 78; Railroad and Telephone Companies *v.* State Board of Equalizers (C. C.), 85 Fed., 302, 307, 318; Fargo *v.* Hart, 193 U. S., 490, 503; Reagan *v.* Farmers Loan & Trust Company, 154 U. S., 362, 391; Nashville, C. & St. L. Ry. *v.* Taylor (C. C.), 86 Fed., 168, 184; Louisville Trust Co. *v.* Stone, 107 Fed., 305, 46 C. C. A., 299)."

U. S. Circ. Ct. App., 1909—Atchison, etc., Ry. Co. *vs.* Sullivan, 173 Fed., 456, 461, 471.

Where a state, under whose authority a tax is levied *sets up a title in itself* to the property taxed, adverse to that of the true owner, and *forbears to enforce the collection* until the "title is adjusted," no claim can be made by it for extraordinary compensation on account of delay in payment of the tax. Interest or penalty in excess of the rate of interest payable on money obligations cannot be collected. (Litchfield *v.* Webster County, 101 U. S. 773, 781.)

The officials of Kentucky by granting junior "patents" have set up title in the Commonwealth, against the true owners of these lands, and have forborne to enforce collection for many years until the Act of 1906, which is not intended to enforce payment, but to forfeit.

> "Interest on unpaid taxes prior to a decree establishing liability therefor, in an action to collect such taxes, is properly refused where the assessment was made in gross upon 60.7 miles of railroad, only 55 miles of which were subject to taxation, since under such circumstances the owners were justified in contesting their liability to such assessment and taxation in gross, and *until there was an identification of the property subject to taxation, and a determination of the amount of taxes due, it would have been inequitable to charge penalties for non-payment.*" (United States Trust Co. *v.* New Mexico, 183 U. S., 535.)

If the tax is valid in part only a sale therefor is void. (25 Am. & Eng. Enc. 387-8, citing Smith *v.* Ryan, 88 Ky., 636). Such a tax cannot lawfully be collected and the tax-payer is not in default for failure to tender the amount legally due. (Santa Clara *v.* Southern P. R. Co., 118 U. S., 394, California *v.* Central P. R. Co., 127 U. S. 1.)

A fortiori such a tax cannot be the basis of a proceeding to forfeit title to the land.

> "The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of serious consideration." (Owensboro Nat. Bk. *v.* Owensboro, 173 U. S., 664, 683.)

The contention of the Court below that this Article III was justified by the revenue power is contradicted by the decisions of this Court, some of which reverse prior judgments of the Kentucky courts, which attempted to extend the tax power to a far less atrocious extent than in the cases now at bar. For instance, this Court has declared void State statutes assessing a Kentucky corporation for a ferry franchise derived from another State (Louisville & J. Ferry Co. *v.* Commonwealth of Ky., 188 U. S., 385, 399, reversing 108 Ky., 717); assessing a Kentucky corporation upon

rolling stock permanently out of that State (Union Refrigerator T. Co. *v.* Comm. of Ky., 199 U. S., 194, reversing 118 Ky., 131); prohibiting judgment unless party has paid taxes on the debt sued on (Walker *v.* Whitehead, 16 Wall., 314, 318); directing deduction of tax from the interest due on stock or bonds (Murray *v.* Charleston, 96 U. S., 432; Hartman *v.* Greenhow, 102 U. S., 672; State tax on Foreign Held Bonds, 82 U. S. (15 Wall), 300); requiring a taxpayer to return all his property whether the liability is fairly contestable or not upon pain of an *ex parte* valuation with no adequate relief therefrom (Central of Georgia R. R. Co. *v.* Wright, 207 U. S., 127, 143); assessing back the whole cost on the abutting property of an owner whose property is taken (Village of Norwood *v.* Baker, 172 U. S., 269).

So, too, an act very similar to that now before this Court has been declared void and the Court said: "This act does not pretend to provide for the *collection* of back taxes, but imposes a *forfeiture* for the failure to pay back taxes. The principles are essentially different. The first simply provides for the collection of the debt, while the other is, in effect, a *confiscation* of the property for an antecedent omission of duty" (Parish *v.* East Coast Cedar Co., 133 N. C., 478; 45 S. E. Rep., 768, 770; followed in Roper Lumber Co. *vs.* Elizabeth City L. Co., 135 N. C., 742; 47 S. E., 757); and other courts have declared to be void an act imposing penalty for non-payment of a tax that had been repealed (Dixon *v.* Jersey City, 37 N. J. Law (8 Vroom), 39); an act directing tax assessor and county clerk to assess a drainage tax (Cleveland, etc., R. Co. *v.* People, 212 Ill., 638; 72 N. E., 785); an act repealing the act for receiving coupons in payment of taxes (Antoni *v.* Wright, 22 Grat. (Va.) 833); the Georgia relief making payment of taxes on debts a condition precedent to recovery (Lathrop *v.* Brown, Fed. Cas. No. 8, 108; 1 Woods, 474); an Ohio act allowing commissions on taxes added to the tax list (Brinckenhoff *v.* Brumfield, 94 Fed., 422; Aulton, etc., Co. *v.* Same, *Id.*).

The argument cited by the Court of Appeals (Record No. 223, fol. 185) from Judge Cooley in his work on Taxation, as applied by the Court, dwells on the often immaterial question of a "day in Court" and minimizes the more important distinction between a tax sale, which returns all the surplus of proceeds to the owner, and a forfeiture, which returns at best to the owner only what if anything is left after giving all they want to all who claim the land "under claim or color of title derived from any source whatsoever" (Record No. 223, fol. 148) and as applied in the cases at bar seems to be entirely inconsistent with many emphatic statements (some of which are elsewhere cited in this Argument) by the same celebrated writer in his work on Constitutional Limitations.

> "Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government when it comes to be carefully scrutinized will prove instead of a tax to be an unlawful confiscation of property unwarranted by any principle of Constitutional Government" (Cooley Const. Lim., 6 Ed., 587).

In Kelly *v.* Pittsburg, 85 Pa. St., 182, 186, Chief Justice Agnew quotes the words of Chief Justice Marshall in Fletcher *v.* Peck, with approval, and in support of the Court's decision declaring void an act taxing farming lands within the boundaries of a city, which could derive no benefit from municipal taxation which, it was urged, infringed the fundamental rights of the citizen.

A statute validating past defective sales for taxes, held invalid because "it assumes to take away property without due process of law." (Opinion by Mr. Justice Gray, Forster *v.* Forster, 129 Mass., 559, citing Williams *v.* Peyton, 4 Wheat., 77.)

A forfeiture declared after due payment of the taxes is void, and the State takes no title to convey to a purchaser. (Davis *v.* Hare, 32 Ark., 387.)

A statute which imposes penalties for past delinquencies is not a constitutional exercise of the taxing

power, but a mere confiscation. (State *v.* City of Jersey City, 37 N. J. Law (8 Vroom), 39.

"Any statute authorizing the sale of a man's property for taxes which had not been levied, or where the property was exempt from taxation, or where the property had not been assessed, or where the taxes had been duly paid, would unquestionably be a taking in excess and outside of the taxing power, and such taking would not be 'due process of law.'"

In re Douglas, 41 La. Ann., 765,767, quoted in Thayer, Cas. Const. Law, Vol. 2, p. 1524.

A fortiori, such laws are void when taxation is a mere pretext for confiscation for the benefit of private persons.

"There are limitations of such powers, which arise out of the essential nature of all free governments; implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.

"Among these is the limitation of the right of taxation, that it can only be used in aid of a public object, an object which is within the purpose for which governments are established.

"It cannot, therefore, be exercised in aid of enterprises strictly private, for the benefit of individuals, though in a remote or collateral way the local public may be benefited thereby.

"Though the line which distinguishes the public use for which taxes may be assessed, from the private use for which they may not, is not always easy to discern, yet it is the duty of the court where the case falls clearly within the latter class, to interpose when properly called on for the protection of the rights of the citizen, and aid to prevent his private property from being unlawfully appropriated to the use of others."

Savings and Loan Assoc. *v.* Topeka, 20 Wall., 655.

"It is not competent for the Legislature to alter or change the rights of patentees or owners of land, for the patent issued by the State is a grant in the nature of a *contract, which between the patentee and the State is inviolable so far as any subsequent act of the State is concerned, being protected by Section 10, Art. I, of the Federal Constitution.*

"And if the Legislature intended by the act (supporting claims of junior patentees) to *alter the rights of the patentees by depriving one of his title to the land*

and conferring it on the other, such attempt was void. Having once parted with its title, the State could not dispossess its grantee, *nor in any way diminish his rights* in the property granted him" (Judge O'Rear in Kidd *vs.* Central Trust, &c., Co., 23 Ky. L. R., 1402; 65 S. W., 355.

"To take property for other than a public purpose; to take, for instance, the property of one citizen and transfer it to another, would be a deprivation thereof without due process of law; and such a proceeding is equally unconstitutional when the appropriation is accompanied by full compensation as when it is legislative confiscation without compensation (Missouri Pac. R. Co. *v.* Nebraska, 164 U. S., 403; Matter of Tuthill, 163 N. Y., 133, 138; Fallsburg Power, etc., Co. *v.* Alexander, 101 Va., 98). For under our Constitution the State is incapable of itself interfering or of conferring any right to interfere with private property unless it is needed for public objects (Matter of Tuthill, *supra; In re* Rhode Island, etc., Co., 22 R. I., 455)."

McGehee, Due Process, p. 255.

In Robinson *v.* Swope, etc. (12 Bush, 21), it was held that the private property of one citizen cannot be constitutionally taken for the private use of another.

In Hancock Stock & Fence Law Co. *v.* Adams, 87 Ky., 417, it was held that the Legislature has no power to take the private property of one person by way of taxation to advance the private interests of another.

In 8 Cyc., at page 1127, it is said:

"The taking by a State of private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is in violation of the Fourteenth Amendment to the Constitution of the United States, even if done under the guise of taxation or of eminent domain."

Prior attempts in other states to take lands from the true owners and vest them in others have been generally held void. See, for instance, Soc. for Propag., etc., *v.* Town of New Haven, 8 Wheat., 464; Kennebec Purchase *v.* Laberee, 2 Me., 275, 11 Am. Dec., 79; Newlan *v.* Marsh, 19 Ill., 385; Lowe *v.* Harris, 112 N. C., 480, 481 (17 S. R., 540); Davis *v.* Gray, 16 Wall., 203; Graded School *v.* Bracken Academy, 95 Ky., 436 (26 S. W., 8); Beekman *v.*

Saratoga, etc., R. Co., 3 Paige (N. Y.), 45, (22 Am. Dec., 679); Trustees of Brookhaven *v.* Smith, 188 N. Y., 74.

And whenever the Court of Appeals is not seeking to enforce an enactment deemed to be "highly politic," it has been as vigorous as the Courts of other States in nullifying unconstitutional acts.

"The legislative power to levy and collect taxes is not arbitrary. . . . After a careful review of the older as well as the later cases in this State, we do not think that this view is in conflict with them, and certainly not with the later ones; and it is in harmony with the opinion of the Supreme Court of the United States, and with those of the courts of last resort in nearly every State in the Union."

Maguiar *v.* Henry, 84 Ky., 8, 13.

"The right of acquiring property and protecting it, found in the Bill of Rights, is even above the right of taxation." Standard Oil Co. *vs.* Commonwealth, 26 Ky. L. R., 985, 987.

"The power to levy and collect taxes is an incident of sovereignty, and it belongs to the legislative department, but the exercise of that all-pervading power, like every other governmental power, is so limited that it cannot be arbitrary, and is subject to rules prescribing bounds to the purpose of the levy, and regulating the manner of assessment and collection.

"*The purpose must be public*, which is usually ascertained by the benefits to flow from the collection of the tax to the public and the consideration which supports the exaction from the citizen. The 'form of taxation' and the power to enforce it cannot be assumed *to cover a different purpose* which is beyond legislative authority; nor can a levy be so made, or statutes for enforcing it so framed, as to *prevent an inquiry, by the courts*, into the nature of the levy or the *character and purpose of the alleged tax*, when such inquiry might show that either levy or tax was the result of an *unconstitutional assumption or forbidden exercise of legislative power*. This follows from the fact that the Legislature is not possessed of uncontrollable power to declare any levy it may make or authorize to be a tax, *when in fact, it is not a tax, but a guise to mistaken or purposed assumption of legislative power*, and when the levy is unassailable still the statute prescribing the *manner for the assessment* and collection of the tax *is invalid, if it precludes the citizen from a hearing on such questions as*

that of inequality of burden, fraud in the assessment, collusion by assessors or collectors with tax title purchasers, or *upon a state of facts which existed at the passage of a curative act that forbade the interference with them by the Legislature on constitutional grounds or principles, on which the inherent and highest rights of men are based*, and have been immemorially recognized in this government. Such statute would be unconstitutional, because it would then destroy the rights of the citizen through the indirect methods of an *alleged remedy which the Legislature had no power to formulate.*

"For the direct destruction of individual rights by legislative declaration is no less unconstitutional than the enactment of remedies which lead to similar results (Vanzant *v.* Waddell, 2 Yerger, 270).

"And the *manner of the exercise of* an otherwise just and clear authority *may be as usurpatory as an arbitrary assumption*, and it is the most insidious method of unauthorized acquisition of power, whose slightest touch should be the instant for pause, and its first and every assertion the occasion for fearless resistance, and the ground of respectful but determined disregard."

City of Louisville *v.* Cochran, 82 Ky., pp. 26–27.

The alternative to confiscation is not exemption but is to sell the land instead of attempting to forfeit it. The argument that tax sales are inefficient was long ago answered by the Court of Appeals of Kentucky (Maguiar *v.* Henry, 84 Ky., 13; *infra*, p. 301).

Moreover, the laws governing proceedings to divest an owner's title by a tax sale are in fact simpler and more easy to comply with than any statute for judicial proceedings to forfeit. It will be easily possible for the Court to sustain title under sales of taxes if the officers of the Commonwealth or of the Counties, moved by a sense of public duty, will conduct proceedings to sell land for taxes with the same care that has been given to the proceedings to forfeit in the cases now before the Court by the instigators of Article III. moved by personal greed, as they hope to be its principal beneficiaries.

Finally, all the arguments that seek to support such attempted forfeitures as a necessary part of the Commonwealth's procedure to collect taxes, are delusions.

The object is not really to collect revenue, but to "outlaw" the valid grant of the State in order to make room for fraudulent and void later grants by State officials of the same land (*infra*, pp. 294, 306).

Although the Court below, in order to confiscate the titles of plaintiff in error, says it "is not tolerable" to interfere with an intent of the legislature to "outlaw" them, the same Court has held in the past that acts of the same legislature which provided for forfeiture without showing an intention to outlaw were ineffective or unconstitutional. Barbour *v.* Nelson, 11 Ky. (1 Litt.), 59, 61; Harlan's Heirs *v.* Seaton's Heirs, 57 Ky. (18 B. Mon.), 312; Marshall *v.* McDaniel, 75 Ky. (12 Bush), 378; Packard *v.* Beaver Valley, etc., Co., 96 Ky., 249; (16 Ky. L. Repr., 451;) and the same Court has also declared Acts of Congress to be void (*infra*, p. 287).

(8) Article III. and the proceedings thereunder are not a constitutional exercise of the "Police Power."

In the course of the opinion the Court says:

"One complaint is that the measure is really not one of revenue, but of police; and that, therefore, it is not germane to the title. There will be found in this general act many features which partake of police regulation as well as of revenue. This is particularly true of the most of the article devoted to license, such as liquor licenses, peddler's, pawnbroker's, billiard tables, pool rooms, exhibitions or circusses, and the like. Such measures might, without any impropriety, have been classed under either head, as they truly pertain to each as they are treated of" (Record No. 223, fol. 174).

In answer to this, it was said in the petition for rehearing:

"Counsel for appellant respectfully protest against this expression of the Court if the language of the Court is intended to imply that the appellant's counsel concede, or ever assumed as a possibility, that these lands could by any statute, in any way, be confiscated or forfeited under the 'police power' of the State. It is submitted that there is not a word in appellant's brief or arguments of its counsel to justify such an inference" (*Id.*, fol. 295).

Nevertheless the Court seems to have been driven to rest the validity of the Act on the exercise of the police power; for in a latter case enforcing this Article III against other parties, the Court says:

> "The validity of Article 3 of the Revenue Act of 1906 was before this Court in the case of Kentucky Coal Lands Corporation *v.* Commonwealth, 106 S. W., 260; 32 Ky. Law Rep., 129, and was there sustained. In that case it was held that the act under consideration partook of revenue *and police features.*" (Commonwealth *v.* Gatliff, 116 S. W., at p. 265).

The Court of Appeals has cited no authority in favor of such extension of the police power and the last cited case was decided by that Court long after the petition for rehearing in which the plaintiff in error had cited not only many sections of the Constitution of Kentucky and prior decisions of the Court of Appeals, but had also quoted most emphatic declarations on this matter of Mr. Justice Harlan, Mr. Justice Holmes, and Mr. Justice Brewer in Chicago, etc. R. Co. *v.* Illinois *ex rel.* Grimwood (200 U. S., 561, 593, 598), which may be found *verbatim* in Record 223, fols. 299–302.

(*a*) *This Article III. is not and does not purport to be an exercise of the police power, and cannot be made so by the judiciary of the State.*

The instigators of the Article, who were listened to by the Court of Appeals, undoubtedly intended that it should be enforced to "regulate rights" (Record No. 223, fol. 175) by confiscating the title of the true owners of the land and conferring it on those instigators.

But there is no evidence that the legislature so intended. The Article is, as the Attorney-General has said, "sandwiched in" (*supra*, p. 3) between other articles relating solely to the collection of revenue and is removed from the articles relating to licenses and other police regulations. In this as in many other respects it differs from the West Virginia Constitutional and Statutory provisions which show by their titles that they relate to settling titles to land.

The "police power" resides with the Legislature and not with the courts, and the latter cannot justify enforc-

ing a statute as a police measure by merely construing it to be such, contrary to the true intent as found by this Court.

> "The judgment of the highest court of a State, sustaining, as a legitimate exertion of the *police power* of the State, a statute the validity of which was challenged as repugnant to the Federal Constitution, is reviewable in the Supreme Court of the United States by writ of error."
>
> Western Turf Ass'n *v.* Greenberg, 204 U. S., p. 359.

This attempt of the Court below to liken this Article III to the ordinary regulations of license fees is far more clearly baseless than a contention of the same character in a recent case where the Court, in reply thereto, said—

> "It is entirely clear that this act of the Legislature does deprive the citizen of his right to engage in a lawful business, except upon the terms that the State will take of his property, without his consent, for the private use of others, and without due process of law. This is not accomplished by requiring that A shall pay directly to B or to B's creditors, a certain sum of money for the financial relief of B or of his creditors; but the same result is effected through a process akin to taxation. It is well settled that the state cannot, under the form of taxation, take the property of its citizens and give it to build up the private fortunes of others."
>
> First State Bank *v.* Shallenberger, 172 Fed., 1003, citing Loan Ass'n *v.* Topeka, and very many other cases.

The license fees to which the Court below refers are for special privileges. The grantee of land by the grant itself has been already granted the perpetual right to keep and use his land. License fees are imposed only on those who want new rights, not to exterminate those they already have; and even the power of restriction and regulation in such cases is itself restricted and regulated by the fundamental law of this nation and the already clearly enunciated judgments of this Court.

> "Where any imposition is laid on persons or property under a general taxing ordinance, the only conclusion that can be drawn is that such tax is laid for revenue purposes alone, unless the contrary is made clearly

to appear, and to construe a general taxing ordinance as a police ordinance it must be shown that the tax collected thereunder is devoted to the expense incident to carrying out its provisions."

Supreme Ct. of App., Va., 1908; Robinson *v.* City of Norfolk, 60 S. E., 762 (headnote).

In this last cited case the Court says:

" To tax occupations outside of a city for the benefit of those living in a city is, in effect, *taking the property of a citizen for private use:* That is, for the use of a particular community, of which the outside citizen forms no part. *Whether it be called a tax or the appropriation of property, the result is precisely the same. Power to violate those rights would seem to be quite beyond the lawful authority of any government, and certainly the legislative department of the Government cannot arbitrarily take the property of one citizen to give it to another, and, of course, cannot authorize others to do so.* . . It is not necessary in this case to decide whether or not the City of Norfolk can assess a license tax against circusses either within or without its territorial limits, under its police power, for the purpose of police regulation, *because it clearly appears from the record that the circus tax in question was levied for the purpose of raising revenue* to defray the general expenses of the City government, and not for the special purpose of meeting the expense incident to such police protection as might be afforded the circus. . . . The distinction between the police power and the taxing power is clearly drawn by the authorities. In 22 Am. & Eng. Enc. L., p. 917, the difference is thus defined: 'The police power must also be distinguished from the taxing power, and the distinction is this: That the taxing power is exercised for the raising of revenue and is subject to certain limitations, while the police power is exercised only for the purpose of promoting the public welfare, and though this end may be attained by taxing or licensing occupations, yet the *object must always be regulation, and not the raising of revenue*, and hence the restrictions upon the taxing power do not apply.' In the case of North Hudson Ry. Co. *v.* Hoboken, 41 N. J. Law, 71, the Court says: 'The exaction of license fees for revenue purposes is the exercise of the power of taxation. *The distinction between the power to license and the police regulation and the same power as a revenue measure is of the utmost importance.* If granted with a view to revenue

the amount of the tax, if not limited by the charter, is in the discretion of the authorities. If given as a *police power, it must be exercised as a means of regulation only, and cannot be used as a source of revenue.*'

"'Only those cases where regulation is the *primary* purpose can be specially referred to the police power. Cooley on Taxation, 587.'

"'Where any imposition is laid upon persons or property under a general taxing ordinance, the only conclusion that can be drawn is that such tax is laid *for revenue purposes alone*, unless the contrary is made clearly to appear. To construe a general taxing ordinance as a police ordinance, it must be shown that the tax collected thereunder is *devoted to the expense incident to carrying out its provisions.* Otherwise, there would be nothing to distinguish a revenue ordinance from a police ordinance.'"

Robinson *v.* City of Norfolk (Va.), 60 S. E., at pp. 763, 764.

(*b*) *Even if this Article III were an attempted exercise of the police power it would not be superior to the National Constitution.*

"The vague and ill-considered notions that are widely entertained as to what is meant by the 'police power' may be observed in certain misleading observations that have considerable currency; *e. g.*, that the Federal Government has no police power in the States; that the States have never parted with the police power. . . . As regards the *Fourteenth Amendment, it had for its main purpose that of cutting down the local legislative power of the States, their 'police power,' and conferring on the General Government the right to restrain them in exercising it.*"

Thayer Cas. Const. Law, Vol. I, p. 742, note.

And in Munn *v.* Illinois, in discussing the police power, Mr. Chief Justice Waite, speaking for this Court said:

"Down to the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property, necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply *prevents the States from doing that which will operate as such deprivation.*

Munn *v.* Illinois, 94 U. S., 113.

"It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?"

Chief Justice Marshall, in Fletcher *vs.* Peck, 6 Cranch, p, 135.

The statement of Chief Justice Marshall in Fletcher *vs.* Peck that the Federal limitations upon State power are founded upon the desire to protect life and property from the sudden and strong passions to which men are exposed, and the Constitution contains what may be deemed a bill of rights for the people of each State has been quoted in many cases.

In the Legal Tender cases, 12 Wall., 581, Mr. Chief Justice Chase said:

"These remarks of Chief Justice Marshall . . . assert fundamental principles of society and government in which that prohibition had its origin. They apply with great force to the construction of the Constitution of the United States."

In like manner and spirit, Mr. Justice Chase had previously declared (Calder *v.* Bull, 3 Dall., 388), that an act of the legislature contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority.

In Poindexter *v.* Greenhow, 114 U. S., 297, the words of Mr. Chief Justice Marshall are quoted and referred to as expressing the doctrine on which the constitutional provision rests.

In Chicago, etc., R. R. Co. *v.* Chicago, 166 U. S , 237, Mr. Justice Harlan said:

"In Citizens' S. & L. Ass'n *v.* Topeka, 20 Wall, 663, Mr. Justice Miller, delivering the judgment of this Court, after observing that there were private rights in every free government beyond the control of the State, and that a government, by whatever name it was called, under which the property of citizens was at the absolute disposition and unlimited control of any depository of power was after all but a despotism, said: 'The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the *judicial* branches

of these governments are all of limited and defined power. There are limitations on such power which grow out of the essential nature of all free governments.'"

Another of the most learned expounders of constitutional law, speaking for his brethren as well as for himself, in rendering the decision of this Court, holding a law to be unconstitutional that sought to divest the true owner of his title to his land, said:

"We have no knowledge of any authority or principle which could support the doctrine that a legislative grant is revocable in its own nature, and held only *durante bene placito*. Such a doctrine *would uproot the very foundations of almost all the land titles in Virginia*, and is utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property legally acquired. . . . But that the Legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the State or dispose of the same to such purpose as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine."

Mr. Justice Story in Terrett *v.* Taylor, 9 Cranch, 50, 52.

And a few years later:

"We know of no case in which a legislative act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced."

Wilkinson *v.* Leland, 2 Peters, 627, 658.

"Under the police power every State has the power to determine what is injurious to public health or morals; but courts may look at the substance of things, and if a statute purporting to have been enacted to protect public morals has no real or substantial relation to

that object or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Logan & Bryan *v.* Postal T. & C. Co., 157 Fed., 571.

"In considering the validity of an enactment of a State Legislature under the police power, the inquiry is whether the regulation or classification has been designed to subserve *some reasonable public purpose*, or is a *mere device or excuse for an unjust discrimination* or for the *oppression or spoilation* of a particular class." Guthrie, Fourteenth Amendment, p. 76.

"To justify the State in thus interposing its authority in behalf of the public, it must appear, first that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose and *not unduly oppressive upon individuals*" (Lawton *v.* Steele, 152 U. S., 133, 136).

"*This power to regulate is not the power to destroy, and limitation is not the equivalent of confiscation.*" Mr. Chief Justice Waite for the Court in Stone *v.* Farmers L. & T. Co., 116 U. S., 307, 331.

Said Mr. Justice Harlan for this Court in Mugler *v.* Kansas City:

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State. *There are of necessity limits beyond which legislation cannot rightfully go.* . . . The Courts must obey the constitution rather than the law-making department of government and must, upon their own responsibility determine whether in any particular case these limits have been passed. . . . *The courts are not bound by mere forms nor are they to be misled by mere pretenses.* . . .

If therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real substantial relation to those objects, or is *a palpable invasion of rights secured by the fundamental law*, it is the duty of the courts so to adjudge and thereby give effect to the constitution" (123 U. S., 623, 661).

In Missouri Ry. *v.* Nebraska, this Court held that a statute which as construed by the highest Court of the State in effect compelled a railroad to allow a

private party to erect an elevator upon its right of way, was unconstitutional and void (164 U. S., 403).

"The taking by a State of the private property of one person or corporation, without the owners consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States." Missouri Pac. Ry. Co. *v.* Nebraska, 164 U. S., 403.

Finally, in declaring the law in a very recent case, the Justices, while differing in their application to the case then before the Court, were unanimous in their judgment of the principles of the law.

Mr. Justice Harlan, in delivering the opinion of the Court, said:

"If the means employed *have no real substantial relation to public objects which government may legally accomplish—if they are arbitrary and unreasonable beyond the necessities of the case—the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action.* The authority of the courts to interfere in such cases is beyond all doubt. Minnesota *v.* Barber, 136 U. S., 313, 320. Upon the general subject there is no real conflict among the adjudged cases. Whatever conflict there is arises upon the question whether there has been or will be in the particular case, within the true meaning of the Constitution, a 'taking' of private property for public use."

Mr. Justice Holmes, concurring, said:

"I concur in the main with the judgment of the Court. I agree that the public authority has a right to widen or deepen a channel if it sees fit, and that any cost that the railroad is put to in rebuilding a bridge the railroad must bear. *But the public must pay for the widening or deepening.*"

Mr. Justice Brewer, dissenting, said:

"When private property is taken for public uses *compensation must be paid.* That is the mandate of the Federal Constitution and of that of nearly every State in the Union. *Independently of such mandate, compensation would be required.* In 2 Kent. Com., 12th Ed., p. 339, it is said":

"A provision for compensation is a necessary attendant on the due and constitutional exercise of the power of the law giver to deprive the individual of his property without his consent; and this principle in American

constitutional jurisprudence is founded in *natural equity*, and is laid down by jurists as an acknowledged principle of *universal law*. See also cases cited in the note, especially Gardner *v.* Newburgh, 2 Johns. Ch., 162, 166, 7 Am. Dec., 526."

"In Sinnickson *v.* Johnson, 17 N. J. L., 129, 145, 34 Am. Dec., 184, referred to approvingly by this Court in Pumpelly *v.* Green Bay & M. Canal Co., 13 Wall., 166, 178, and Monongahela Nav. Co. *v.* United States, 148 U. S., 312, 324, it was said:

"This power to take private property reaches back of all constituted provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle."

"If this be true when the taking is for that which is solely a public use, *how much more true is it when the taking is largely for the benefit of private individuals, and at best only incidentally for the benefit of the public?* Now, the sole purpose of this proceeding, as admitted by the demurrer, was the transformation of these swamp and untillable lands into good tillable lands; in other words, to that extent increasing the value of the farms in the hands of their private owners. While the statute under which these proceedings were had contemplates drainage for agricultural and sanitary purposes, there is nothing in this record to show that any sanitary result was contemplated, and the only object disclosed is the direct beneficial result to the owners of these swamp lands. There is not the slightest intimation that the health, morals, or safety of the community will be promoted, or is intended to be promoted, by the drainage." . . . "But it is said that this is done under the *police power* of the State, and that that can be exercised without any provision for compensation. It seems to me the *police power has become the refuge of every grievous wrong upon private property. Whenever any unjust burden is cast upon the owner of private property which cannot be supported under the power of eminent domain or that of taxation, it is referred to the police power. But no exercise of the police power can disregard the constitutional guaranties* in respect to the taking of private property, due process and equal protection, *nor should it override the demands of natural justice.*"

Chicago, B. & Q. R. Co. *v.* Illinois *ex rel.* Grimwood, 200 U. S., 561, 593, 598.

If this Article III of the Kentucky Revenue Act of 1906 could be justified as a legitimate exercise of the "police power" all other constitutional restraints would be a mockery. The police power would nullify all of them.

"Every partial or private law, which directly proposes to *destroy* or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, *odious individuals and corporate bodies* would be governed by one rule, and the mass of the community who made the law by another." So said Mr. Justice Catron in the Supreme Court of Tennessee, quoted and approved in Cotting *v.* Kansas City, etc., Co., 183 U. S., 79, 105, and by the United States Circuit Court in United States *v.* New York, N. H., etc., R. Co., 165 Fed., 742, 746.

In United States *v.* Delaware & H. Co. it was stated by the Court as a ground for holding the Statute there in question void that

"the coal described in the foregoing categories is *outlawed* in interstate commerce," and to comply with the Statute would result either in great loss to the public or "would necessarily inflict upon the defendants and their stockholders a most disastrous sacrifice and pecuniary loss" (164 Fed., 215, 225).

"By the 16th section of Article I of the Constitution of Washington no private property can be taken or damaged for public use without just compensation. The similar limitation upon the power of the general government, expressed in the Fifth Amendment, . . . prohibiting the states from depriving any person of property without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws. *The amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property and secures equal protection to all under like circumstances in the enjoyment of their rights.*"

"*Assuming our jurisdiction to revise the judgment of a state tribunal upholding a law authorizing the taking of private property without compensation, to be unquestionable* (Kaukauna Water Power Co. *v.* Green Bay & M. Canal Co., 142 U. S., 254, 269), we cannot accede to the position that the action of the Harbor Line Commissioners, in locating the harbor line and

filling the plat, would take any of relator's property, or so injuriously affect it as to come within the constitutional inhibition."

Yesler *v.* Board of Harbor Line Commissioners, 146 U. S., 655.

In Lawton *v.* Steele, 152 U. S., 133, Mr. Justice Brown, in delivering the opinion of the Court, said:

"The legislature may not under the guise of protecting the public interests arbitrarily interfere with private business or impose unusual and unnecessary restrictions on lawful occupations. In other words, *its determination as to what is a proper exercise of its police powers is not final or conclusive*, but is subject to the supervision of the courts," and Mr. Chief Justice Fuller (with whom concurred Mr. Justice Field and Mr. Justice Brewer), in a dissenting opinion, said, "The police power rests upon necessity and the right of self-protection, but *private property cannot be invaded under the mere guise of police regulation nor forfeited for alleged violation of law by its owner*, nor destroyed by way of penalty inflicted on him without opportunity to be heard" (152 U. S., 144).

And Mr. Justice Bradley, in his concurring opinion in Davidson *v.* New Orleans, said:

"I think, therefore, we are entitled, under the XIVth Amendment, not only to see that there is some process of law, but 'due process of law,' provided by the State law when a citizen is deprived of his property; and that in judging what is 'due process of law' respect must be had *to the cause and object of the taking*, whether under the taxing power, the power of eminent domain or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case it will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive and unjust it may be declared to be not 'due process of law'" (96 U. S., 97).

Years ago this Court declared:

"Recognizing the difficulty in defining with exactness the phrase 'due process of law' it is certain these words imply a conformity with natural and inherent principles of justice, *and forbid that one man's property or right to property shall be taken for the benefit of another, or for the benefit of the State, without compensation*, and that no one shall be condemned in his person

or property without an opportunity of being heard in his own defense."

Holden *vs.* Hardy, 169 U. S., 366, 390.

"This Court has held, notably in the cases of Davidson *v.* New Orleans (96 U. S., 97) and Yick Wo *v.* Hopkins (118 U. S., 356), that the *police power* cannot be put forward as an excuse for *oppressive and unjust* legislation."

Holden *vs.* Hardy (*supra*, at p. 392).

Mr. Justice Miller, in delivering the opinion of the Supreme Court of the United States, says:

"To lay with one hand the power of the Government on the property of the citizens and with the other to bestow it upon favored individuals . . . is none the less robbery because done under the forms of law and called *taxation*. This is not legislation—it is a decree under legislative forms."

Savings & Loan Assoc. *v.* Topeka, 20 Wall., 688.

"It is not true that a State cannot bind itself by contract in reference to any matters within the reach of her police power in the broadest sense. The power to contract is limited only with respect to powers necessary *for protecting the public health or public morals.*"

New Orleans Gas Co. *v.* Louisiana Light, &c., Co., 115 U. S., 650, 667, and cases there cited.

"When, however, public purposes require for the effective exercise of the police power an actual appropriation of the property of citizens chargeable with no wrong, the *eminent domain as well as the police power is involved*, and compensation must be made to the owners."

McGehee, Due Process of Law, p. 205, citing Sweet *v.* Rechel, 159 U. S., 380.

"When the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the Crown, except as provided by the law of the land, they meant by 'law of the land' the ancient and customary laws of the English people, or laws enacted by the Parliament, of which those barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no State shall

deprive any person of life, liberty or property without due process of law,' can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail or has no application where the invasion of private rights is affected under the forms of State legislation."

Davidson *v.* New Orleans, 96 U. S., 97, 101, 102.

Mr. Justice Harlan, for this Court, has said:

"Within the meaning of that Amendment, a deprivation of property without due process of law occurs when it results from the arbitrary exercise of power inconsistent with 'those settled usages' and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country (*Den ex dem.* Murray *v.* Hoboken Land & Improv. Co., 18 How. 272; Bank of Columbia *v.* Okely, 4 Wheat, 235, 244)."

Tracy *v.* Ginzberg, 205 U. S., pp. 170, 178.

"That the legislature of the state is not the final judge of the limitations of the police power, and that such enactments are subject to the scrutiny of the courts, and will be set aside when found to be unwarranted and arbitrary interferences with rights protected by the Constitution in carrying on a lawful business or making contracts for the use and enjoyment of property, is well settled by former decisions of this court. Lawton *v.* Steele, 152 U. S. 137; Holden *v.* Hardy, 169 U. S. 366; Dobbins *v.* Los Angeles, 195 U. S. 236."

New York *ex rel.* Silz *v.* Hesterberg, 211 U. S. p 39.

That the police power of a state is not superior to the National Constitution is shown also by the repeated decisions of this Court that such power cannot invade the domain or impede the powers confided by the National Constitution to the Federal Government.

Gibbons *v.* Ogden, 9 Wheat. 1;

Henderson *v.* Mayor, 92 U. S., 259;

Chi Lung *v.* Freeman, 92 U. S., 275;

Railroad Co. *v.* Husen, 95 U. S., 465.

"The true and real Commonwealth which contracted the obligation is incapable in law of doing anything in derogation of it. Whatever having that effect, if operative, has been attempted or done, is the work of its

government acting without authority, in violation of its fundamental law, and must be looked upon in all courts of justice, as if it were not and never had been . . . Such is the sentence of the Constitution itself, the fundamental and supreme law for Virginia, as for all the states and for all the people, both of the states separately and of the United States, and which speaks with sovereign and commanding voice, expecting and receiving ready and cheerful obedience, not so much for the display of its power, as on account of the majesty of its authority and the justice of its mandates."

Poindexter *v.* Greenhow, 114 U. S., 293, 306.

A forfeiture will not be enforced on principles which, if not forbidden by the Common law would be utterly inconsistent with its spirit.

U. S. *v.* De La Mazo Arredondo, 6 Pet., 691.

An act granting lands belonging to a Society to the respective town in which the land is, held unconstitutional and void because the property was protected by Treaty with Great Britain. Society *v.* New Haven, 8 Wheat., 492.

"The Statutes of 1798, c. 9, and of 1802, c. 5, asserting the right of the legislature to all the property of the Episcopal Church, and repealing the previous statutes conferring the title to such property upon the church, were void, as being an unwarrantable confiscation by the legislature of property to which it had no color of title, and which was legally vested in such church." Terret *v.* Taylor, 9 Church, 43.

"The confiscation acts of August 6, 1861 and July 17, 1862, were an exercise of the war power of the government, and are therefore not in conflict with the constitution, which provides that no person shall be deprived of his property without due process of law." Miller *v.* United States, 11 Wall., 268.

"A reservation of 'wharves and wharfing privileges' in a dedication to a city does not include the right to appropriate for wharfage purposes a street or an extension thereof which cannot be taken away or destroyed without compensation without denying the due process of law secured by Const. U. S., Amend. 14. Mead *v.* City of Portland, 200 U. S., 148.

This Court it is confidently believed never will hold that the police power extends to quieting titles to land by exterminating the rights of one side to the controversy; and that, in selecting the side to be exterminated, it is

constitutionally "politic" to select that side that has but little vote in the election of the legislature and the judiciary.

In Yick Wo *v.* Hopkins, a municipal ordinance to regulate the carrying on of public laundries within the limits of the municipality was decided not to be a legitimate exercise of the police power of the state, because it conferred upon the municipal authorities arbitrary power to give or withhold consent as to persons or places for the carrying on of the business, and thus was inimical to the letter and spirit of the fourteenth amendment" (118 U. S., 356).

The law all over the country is that—

"The legislature cannot under the guise of exercising the police power arbitrarily invade personal rights or private property, nor impose upon property burdens so excessive as to work a *confiscation thereof*" (8 Cyc., 864).

Long ago the true limits of the police power when free from the conditions restricting the exercise of the power of eminent domain were fixed.

"It is not an appropriation of the property to a public use but *the restraint of an injurious private use* by the owner, and is therefore not within the principle of property taken under the right of eminent domain. . . . In respect to land lying in the interior and used for agricultural purposes, there is little occasion to impose any restraint upon the absolute dominion of the owner, because such restraint is not necessary to prevent it from being injurious."

So said Chief Justice Shaw in holding that the establishment of wharf and pier lines was within the police power.

1853, Commonwealth *v.* Alger, 7 Cush., 53; also published in Thayer, Cas. Const. Law, Vol, 1, p. 693, 699, 702.

In *Gaines* vs. *Buford*, Ky., 1 Dana, 490, it is said by the Court:

"Those constitutional provisions which were intended to shield the property and contracts of the citizen, were considered in the case of *Davis* vs. *Ballard*, 1. J. J. Mar., 566, by this Court. It was there determined that *the Legislature had no power to take the property of one citizen and transfer it to another*, or to apply it

to public use without the consent of his representatives, and without just compensation being previously made to him. . . . The Act of 1824 provided for taking away the land, but makes no provision for paying the owner a just compensation. The principles settled in *Davis* vs. *Ballard* denounce the act as unconstitutional."

"There may, therefore, be many claimants who, with every disposition to comply with the requirements of the act to save their lands from forfeiture, could not possibly do it. The operation of the act, if enforced, upon such persons, would be *more severe, in relation to their property, than an attainder for treason or felony could be made* under any judicial proceedings which the Legislature might authorize." . . .

"Thus, by comparing the Act of 1824 with the Constitution, I find that while the Legislature are expressly prohibited from passing laws to forfeit the estates of attained traitors and felons except during life, they have undertaken to forfeit forever the estates of those who have been guilty of no crime, *unless it be a crime to have the better title to a tract of land held adversely by another!* This contrast fortifies my conviction that the Legislature do not possess the power to pass a bill of forfeiture like this." . . .

"I cannot, therefore, perceive the shadow of analogy between a law which secures compensation for improvements made in good faith, and a law which forfeits the estate, without a crime, and transfers it to another, who is not required to pay the owner one cent. The principles and operations of a law to forfeit land, and a law to secure to occupants the value of improvements, are altogether dissimilar; and, therefore, I cannot perceive how they are so connected that they must stand or fall together." . . .

"If the decision of the Supreme Court be right the Act of 1824 is a palpable *attempt to coerce the better claimant to purchase justice, and it prescribes the price* at which the Federal courts are to sell it. I have heard it said that the clause of the Constitution which prohibits the sale of justice was merely intended to operate upon the judiciary and to restrain corrupt practices of judges. I give it no such limited construction, but extend it to all the departments of government, and would enforce it as one of those great fundamental principles essential to the welfare of society." . . .

"The Legislature has no power to revise, annul or counteract a decision of this Court, much less one of the Supreme Court. If the law, as expounded by the

judiciary, is not consistent with the public will, it is the province of the Legislature to alter it in regard to new cases; but the Legislature has no power to say this or that judicial sentence is erroneous, and, therefore, we will alter it.

"I have endeavored to show that the Legislature cannot constitutionally forfeit land because the owner will not clear it, or build house of brick or stone, or ornament it with gardens, &c., &c. If I am right in that position I cannot perceive *how it is possible to make the forfeiture constitutional by regarding it as the means to accomplish a desirable end.* I do not subscribe to the doctrine that the end will justify the means, either in law or morals." . . .

"I shall notice one idea more in defense of the act, and only one. It is the appeal made in the preamble to the sovereign power of the State. I do not admit that there is any sovereign power, in the literal meaning of the terms, to be found anywhere in our systems of government." . . .

"'Sovereign state' are cabalistic words, not understood by the disciple of liberty, who has been instructed in our constitutional schools. It is an appropriate phrase when applied to an absolute despotism. I firmly believe that the idea of sovereign power in the government of a republic is incompatible with the existence and permanent foundation of civil liberty and the rights of property." . . .

"If the power attempted to be assumed is a wholesome one, and was wisely and equitably exerted in the given instance, it will be matter of regret that other and higher considerations induced the framers of the constitution to withold from the Legislature the power of giving such wholesome and summary redress. If, on the contrary, the existence of such power would be noxious to the common weal, and its exercise in this instance was oppressive, unwise, unjust, then it will be matter of congratulation that the wisdom of the constitution has secured the community against such extensive oppression, and that the very extent of the evil intended is of itself a security against its perpetration."

"Men will rejoice or regret on this subject according to their different views of the wisdom and justice of this act. But with that we have nothing judicially to do. We must test its validity without regard to the presence or absence of those qualities."

Gaines *v.* Buford, Ky. (1 Dana), 490.

"The Federal Constitution is the paramount law of the land. A Statute of a State in conflict with it is void. State Statutes, therefore, when they come within the domain of the powers of government over which the Federal Constitution extends, must be read and applied with reference to the provisions of that instrument. . . . State Constitutions are limitations of powers and while a Legislature may enact any Statute not prohibited by the Constitution, yet it is bound by its limitations."

Ky. Ct. App., 1909, Commonwealth *v.* Internat. Harvester Co., 115 S. W., 703.

A recent decision in a sister State shows the mind of the Courts of the States generally. The head note summarizes as follows:

"While the State has the right to enter upon private lands for the purpose of surveying and locating boundary lines, its agents exceed their lawful powers when, without provision for compensation, they inflict substantial and permanent damages upon such property in locating a permanent base line, although the work is done with due care and skill." . . . "In the absence of any *overwhelming necessity or emergency requiring immediate action*, the police power cannot be properly invoked to justify such action." . . . "Such an entry and occupation is a taking of property within the meaning of the State and Federal Constitutions."

"When, therefore, public officers assume to act for the State, and although acting in good faith and believing themselves authorized to act for it, take and destroy property without due process of law and just compensation, their acts, being contrary to law, cannot be the acts of the State, but are their individual acts, for which they alone are responsible; and an action is maintainable against them personally to restrain the further commission of such unlawful acts and to recover the damages already accrued" (Litchfield *v.* Bond, 186 N. Y., 66; 78 N. E., 719).

The Court, in the course of its opinion, in the last cited case, says:

"A controversy of such long standing, even though it involved the jurisdiction of Courts, the right of the franchise and the power of taxation, presented no exigency that required the *immediate and arbitrary exercise of the police power or the law of overwhelming necessity in the invasion of private rights* (Am. Print. Works *v.* Lawrence, 23 N. J. Law, 590; Matter of

Jacobs, 98 N. Y., 108; Wynehamer *v.* People, 13 N. Y., 401). It is to be observed, moreover, that the police power, which is concededly an inherent attribute of sovereignty, should be permitted to *override or nullify our constitutional limitations* only in cases of the *highest public necessity*. That governmental power, like every other, is subject to the Constitution, and when it is paramount it is because it is not limited by the Constitution, or because some *immediate and overruling emergency* calls for the application of the maxim *salus populi suprema lex*." . . . "Such a statute, if intended to authorize the exercise of the right of eminent domain, would be clearly unconstitutional, because *it makes no provision for compensation* to those whose private property is to be taken for a public use" (186 N. Y., pp. 67, 72, 73, 74).

Private property can only be taken for public use through the exercise of the single principle of eminent domain, which in all cases carries with it the right of due compensation. The exercise of the general police power of a State extends only to the regulation of the owner's use and dominion of private property, and does not authorize it to take, appropriate or damage private property so as to deprive the owner of its dominion, use, control and profits, without due compensation. Hollingsworth *v.* Parish of Tensas (C. C.) 17 Fed. 109."

"The taking by a municipal corporation, for the use of the municipality, of a system of water works belonging to a private corporation, under an act of the legislature providing that the valuation to be paid therefor should be the 'fair value of said property for the purposes of its use by the City,' and that 'such value shall be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company,' is a taking without just compensation, and is therefore in conflict with the Fourteenth Amendment to the Constitution of the United States, providing that no person shall be deprived of his property without due process of law. Newburyport Water Co. *v.* City of Newburyport, 103 F., 584."

"Rev. St. c. 24, Sec. 9, providing that a person having color of title to vacant and unoccupied land, who shall pay taxes thereon for seven successive years, shall be deemed the legal owner thereof, is unconstitutional, as absolutely transferring the land of one person to another. Harding *v.* Butts, 18 Ill. (8 Peck), 502, followed in Lee *v.* Newkirk, 18 Ill. (8 Peck), 551."

In State *v.* Post, 55 N. J. Law 264, the Court held that an act confirming title to oyster beds was void, because it

applied only to those who were then in possession, and could never apply to others.

"An Act requiring one claiming land returned delinquent and sold to the State for taxes in another's name to pay the taxes before being entitled to sue to recover possession of, or protect the land from injury by suit, would be beyond the Legislature's power."

Head Note, Va. Ct. App. 1908, Harvey *v.* Hoffman, 62 S. E., 371.

"The police power of a State is not absolute, and its exercise is subject to review by the courts. Neither the Legislature nor a municipality can, under the guise of police regulation, arbitrarily invade personal or property rights; and when such regulations are called in question the test should be whether they have some relation to the public health or public safety, and whether such is in fact the end sought to be attained. If not, they should be declared invalid, as exceeding the legislative power; but if, within such power, the courts have nothing to do with the wisdom, policy, or expediency of the law, the power to make it, necessarily carrying with it the power to judge of its necessity, expediency and justice, and primarily, at least, of the reasonableness of the means used to accomplish the end sought." (California Reduction Co. *v.* Sanitary Reduction Works, 126 F., 29, 61 C. C. A., 91; affirmed, 199 U. S., 306).

An arbitrary interference with property rights protected by Const. U. S., Amend. 14, which cannot be justified as an exercise of the *police power*, results from the narrowing, by municipal ordinance, of the limits within which gas works may be erected and maintained, so as to include within the prohibited territory properly purchased for that purpose within the district wherein the erection of such works was then permitted, and on which such erection was then proceeding in compliance with an existing ordinance and a permit of the Board of Fire Commissioners where such change was not demanded by the public welfare, and seems rather to have been actuated by a purpose to perpetuate a monopoly enjoyed by a gas company whose works were still within the privileged district (Dobbins *v.* City of Los Angeles, 195 U. S., 223 (reversing 72 P., 970; 139 Cal., 179; Daly *v.* Elton, 195 U. S., 242 (reversing 72 P., 1097; 139 Cal., 216).

"Under the *police power* every State has the power to determine what is injurious to public health or morals; but courts may look at the substance of things, and if a statute purporting to have been enacted to protect public morals has no real or substantial relation to that object or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." (Logan & Bryan *v.* Postal T. & C. Co., 157 Fed., 571.)

"The Legislature cannot, under the guise of exercising the police power, arbitrarily invade personal rights or private property, nor impose upon property *burdens so excessive as to work a confiscation thereof.*" (8 Cyc. 864—citing cases.)

"Small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil," while "larger ones could not be, except by the exercise of the right of eminent domain." Rideout *vs.* Knox, 148 Mass., 368-372, 19 N. E., 390, 392, 1 L. R. A., 781; Sawyer *vs.* Davis, 136 Mass., 239-242, 49 Am. Rep., 27.

(c) *If private property be taken compensation must be made.*

"By the general law of European nations and the common law of England, it was a qualification of the right of eminent domain, that compensation should be made for private property taken or sacrificed for public use.

"And the constitutional provision of the United States, and of the several States which declare that private property shall not be taken for public use without just compensation, were intended to establish this principle beyond legislative control."

Pumpelly *v.* Canal Co., 80 U. S., 166 (Syllabus).

The Constitution of the State of Kentucky is most emphatic:

"Nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."

Ky. Const. Bill of Rights, Section 13.

"Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

Ky. Const. Bill of Rights, Section 3.

"To guard against transgression of the high powers which we have delegated, we declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void."

Ky. Const. Bill of Rights, Sec. 26.

"The Court of Appeals of Kentucky, in construing the foregoing section as it appeared in an earlier Constitution of Kentucky, said bluntly:

'There are no implied exceptions to the Bill of Rights.'"

Commonwealth *vs.* Jones, 73 Ky. (10 Bush), 725, 746.
See also Pratt *vs.* Breckenridge, 23 Ky. L. R., 1356 (65 S. W., 136).

Notwithstanding the police power all forfeiting acts have been heretofore held void or ineffective in Kentucky (*supra*, p. 261).

(*d*) *Forfeiture is impossible as a condition subsequent not stated in the grant* (*supra*, pp. 164, 171).

The attempt has been made, and failed, to justify forfeiture for failure to pay taxes on the ground that the owner of the land takes it with the implied condition that his title is so subject to forfeiture on failure of such payment; and in support of the argument are cited the cases where Virginia in its early history forfeited lands for failure to pay the deferred instalments of purchase money due to the State or for failure to make improvements or cultivate the land.

But these conditions were not *implied* but were by the statutes expressed as conditions precedent to the consummation of the full legal title in the patentee. Such expressed conditions are analogous to those of an option to purchase, in which case the Courts have sometimes enforced a forfeiture of all interests of the purchaser on his failure to pay all or any of the deferred instalments. But when the legal title has passed without any expressed conditions and a vendor's lien is retained, or a deed of trust or mortgage granted to secure the deferred purchase money, the case becomes analogous to the issue by the State of a patent as under the Virginia Law of 1779 with-

out expressed conditions; and the Courts for centuries in the case of transactions between individuals have refused to permit a forfeiture for default in payment of the deferred instalments of purchase money and have insisted that the purchasing grantee shall have his "equity of redemption." This "equity of redemption" involves not merely a "day of grace" or postponement of the day of forfeiture but a return to the purchasing grantee *of the surplus of proceeds of sale above the amount* required to pay the amount due for the land.

(*e*) *Escheat is impossible if heirs exist although unknown.*

The Act of April 22, 1882, relating to escheats and vesting in the Board of Trustees of the City of Louisville all moneys, property and credits in said city, held on deposit or otherwise, the last known owner of which has neither been heard of nor exercised any act of ownership over the property in eight years—held unconstitutional for the reason that the authority given to the School Board to sue and recover, of one in rightful possession, money or other property presumed to have no real power by reason of the lapse of time, and to hold it as a gift from the State, leaving the bailee responsible to the real owner, and requiring both to look to the School Board for its value, is changing the legal status of the parties without their consent. Louisville School Board *v.* Bank of Kentucky, 86 Ky., 150; 9 Ky. L. R. 433; 5 S. W., 739; Bank of Louisville *v.* Board of Trustees, 83 Ky., 219; 7 Ky. L. R., 185; 5 S. W., 742.

(*f*) *Confiscation is justifiable only under the war power.*

The right to confiscate exists only when it is "a legitimate exercise of the war power" (Miller *v.* United States, 11 Wall., 268), and "has no reference whatever to the personal guilt of the owner of the confiscated property and the Act of Confiscation is not a proceeding against him. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent" (*Id.*. 11 Wall, p. 306).

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted."

Ky. Const. Bill of Rights, 17.

A similar provision exists in the Constitution of Texas (as of most other states), where it was held that "fine" includes "penalties," and applied to penalties imposed by an act for failure of taxpayer to pay taxes, where the penalties exceeded the amount of the tax, and the act was held void.

Texas Ct. App., 1906. State *v.* Galveston, etc., Ry. Co., 97 S. W., 71.

Under a constitution providing that no conviction of crime shall work a "forfeiture of estate," no man's property can be forfeited as a punishment for crime. Miller *v.* State, 3 Ohio, 473.

"When no other penalty is mentioned for a failure to do an act or the doing of an act forbidden or required by this chapter, the penalty in all such cases shall not be less than ten nor more than five hundred dollars." (Ky. Stats., Carroll, 1903, Section 4029).

Act of January 7, 1824 (forfeiting to Commonwealth without inquisition or office found, or judgment, every tract of land of more than 1,000 acres unless the owner cleared a certain number of acres in each 1,000 before August 1, 1825), held unconstitutional: First, as violating Compact with Virginia and also on other grounds (Buford *v.* Gaines, 1 Dana, 479, 517).

(*g*) *Even treason does not justify confiscation.*

The Court says in the case at bar:

"The forfeiture is not a tax. Nor is it the equivalent. It is a penalty imposed for a violation of a statute."

And what is the penalty? It is more severe in some respects than the penalty for *treason*. For the Constitution of Kentucky declares that:

"No person shall be attainted of treason or felony by the General Assembly, and no attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the Commonwealth."

Ky. Const. Bill of Rights, Section 20.

"No attainder of *treason* shall work corruption of blood, or forfeiture except during the life of the person attainted."

U. S. Const., Art. III, Sec. 2;

Bigelow *v.* Forest, 9 Wall., 339;

Day *v.* Micon, 18 Wall., 160, 162;
Ex parte Lange, 18 Wall., 176-7;
Wallach *v.* Van Riswick, 2 Otto, 202.

The same provision existed in many of the English Statutes even prior to the American Revolution.

Wallach *v.* Van Riswick (*supra*).

Attainder of treason cannot disinherit in England, except during the life of the offender (Stat. 3 and 4 Wm. IV., Chap. 106, enlarging 54 Geo. III, Ch. 145). In the United States there can be no forfeiture except for treason, and attainder of treason works corruption of blood during the life of the person attainted only (U. S. Const., Art. 3, Sec. 3; Bigelow *v.* Forest, 9 Wall., 339; Page *v.* United States, 11 Wall., 268).

When the confiscation is as a punishment for treason, the fee or absolute title cannot be confiscated, but only the life estate of the traitor (Jenkins *v.* Collard, 145 U. S., 552, and cases there cited).

In a case under another statute, counsel having pointed out that forfeiture of the whole was a punishment greater than that for treason, the Court of Appeals refused to adjudge forfeiture, and said:

> "There may, therefore, be many claimants who, with every disposition to comply with the requirements of the act, to save their lands from forfeiture, could not possibly do it. The operation of the act, if enforced upon such persons, would be more severe, in relation to their property, than an attainder for *treason or felony* could be made, under any judicial proceedings which the Legislature might authorize."

Gaines *v.* Buford, 31 Ky. (1 Dana), 492.

In a very recent case construing the constitutional provision for escheat after five years of lands not needed for the purposes of the Corporation, the Court of Appeals said:

> "We will not impute to the makers of the Constitution, or to the legislature, *the degrading motive* of intending, by the provisions in question, *to enrich the State at the expense of its citizens*, nor will we assume that it was merely their *purpose to punish* offending corporations. . . . Such being the object of the law, can it fairly be contended that a *bona fide* sale by a corporation of useless property, even after the

five years period—the State having in the meantime withheld escheat proceedings—does not accord with and carry out the policy of the law? In the event of such conveyance of the property, what ground of complaint can the State have, and what further interest has it to subserve? Obviously, these questions must be answered in the negative, unless the State has the right to enforce the escheat *for the sole purpose of enriching itself or inflicting punishment upon the corporation*—an assumption which, we have said, should not be indulged. As well argued by counsel, forfeiture to the State of a fee in real estate is not permitted by the Constitution by way of punishment, even for treason, the greatest of crimes. (Constitution, section 20.)"

Louisville School Board *v.* King, 32 Ky. L. Repr., p. 689.

(*h*) *The Kentucky courts have not hesitated to declare null acts of Congress which were more nearly true exercises of the war power or of the police power than the article now in question.*

In the opinion in case No. 223 the Court of Appeals has said that it would be "not tolerable" for the courts to interfere with the intent of the Legislature as found by the Court in the cases now at bar.

But this should not be taken as seriously representing the views of the Court when questions other than that of confiscating titles are concerned, for in almost all cases that have come before that Court, its decisions (many of which are cited throughout this argument), made both before and since the decisions in the cases at bar, whenever the occasion has arisen, have been generally rigorous in sustaining the Constitution against Acts of Legislature and even against Acts of Congress (*supra*, p. 249).

The discrimination is one of the many denials to the plaintiff in error of the equal protection of the law.

(*i*) *In the extension of the police power "lurks no small danger to the Republic."*

"The spirit of a system such as ours is, therefore, at total variance with that which, more or less veiled, still shows in the paternalism of other nations. . . . So,

while the police power is one whose proper use makes most potently for good, *in its undefined scope and inordinate exercise lurks no small aanger to the republic.* For the difficulty which is experienced in defining its just limits and bounds, affords a temptation to the Legislature to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant. . . . It is sought to uphold the law because 'it is a police regulation.' It is argued that 'the people have passed the law; let not the courts interfere with it. If the people are dissatisfied they may amend or repeal it.'"

Ex parte Jentzsh, 112 Cal., 468, 472; 44 Pac., 803, 804.

The Supreme Court of Wisconsin, after quoting and approving the foregoing, says:

"We were favored with a similar argument in this case, but such arguments, of course, are of no avail."

Bonnett *v.* Vallier, 116 N. W., 885.

Quotations of this character from the opinion of other State Courts might be multiplied, for they express a widespread distrust and dread.

As an appeal to the protection of this Court is the final refuge of the weak from lawless aggressions under the forms of law, so is an appeal to the "police power" always the last resort of the aggressors. Panoplied in the figments of "police power," notwithstanding all the warnings of this Court in the past, they come here, shameless and unafraid.

Conclusion.

"In vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights when wrongfully withheld or invaded."

Blackstone, 1 Com., 55, quoted by Judge Severens in City of Cleveland, Tennessee, v. United States, 166 Fed., 681.

"If the Legislature felt itself absolved from those rules of property which are common to all the citizens of the United States and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone, and the same power may divest any other individual of his lands, if it shall be the will of the Legislature so to exert it."

Mr. Chief Justice Marshall,
Fletcher vs. *Peck, 6 Cranch, 134.*

"If the legislatures of the several states may at will annul the judgments of the Courts of the United States, and destroy the rights acquired under those judgments the Constitution becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunal. So fatal a result must be deprecated by all; and the people . . . must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves."

Mr. Chief Justice Marshall,
United States vs. *Judge Peters, 5 Cranch. at p. 136, quoted by Mr. Justice Baldwin,*
Rhode Island vs. *Massachusetts, 12 Pet., at p. 75.*

"Thus, by comparing the Act of 1824 with the Constitution, I find that . . . they (the Legislature) have undertaken to forfeit forever the estates of those who have been guilty of no crime, *unless it be a crime to have the better title to a tract of land held adversely by another* This contrast fortifies my conviction that the Legislature do not possess the power to pass a bill of forfeiture like this."

Judge Underwood
in Gaines v. *Buford, 31 Ky. (1 Dana,) at p. 492.*

Upon the whole case it is contended:

(1) That this Article III is void as to past so-called "delinquencies" because it is *ex post facto* as to all to whom it purports to apply (*supra*, p. 74) and in a special manner *ex post facto* as to plaintiff in error, a subsequent purchaser (*Id.*, p. 90), and also void both as to the past and future because, as construed by the Court below, it impairs the obligation of the Compact with Virginia (*Id.*, pp. 154–170), and the obligation of the original grants (*Id.*, p. 177) and the obligation of the contracts and deeds made with and to the plaintiff in error (*Id.*, p. 178); and denies due process and equal protection of the law (*Id.*, pp. 226, *seq.*).

(2) That the proceedings now at bar, including the judgment declaring forfeiture, are void for the same reasons, and also because, **irrespective of the invalidity of the enactment, these proceedings contain many additional denials of due process and equal protection** (*Id.*, pp. 246, *seq.*).

This Article III as construed by the Court of Appeals of Kentucky is, it is submitted, one of the most atrocious attempts at *ex post facto* legislation that can be found on the Statute books of any Country of the World. The text of the Article shows clearly that it is the *past failure* to list these lands prior to the passage of this Act that is the "*cause of forfeiture*," and that the failure to list after the passage of the Act is *not* the cause for forfeiture, but simply a failure to "*extinguish*" the cause of forfeiture (*supra*, p. 9); consequently, the Article imposed *ex post facto* a penalty that did not exist at the time of the delinquency. The Article, moreover, is attempted to be enforced against plaintiff in error, who did not become an owner until too late to "extinguish" the cause.

This Article III, as so construed, is also one of the most atrocious attempts to impair the obligation of contracts, for one of the contracts so impaired is the State's own solemn compact, and the purpose of Article III is to evade it (*supra*, pp. 156, *seq.*).

This Article III, as so construed and as enforced in the cases now at bar, is also one of the most atrocious attempts

to deny due process and equal protection of the laws. For the opinions of this Court show clearly that "due process of law" includes a *fair chance for justice*—it means something more than "a day in Court" with all the powers of a State bent on a confiscation—something more than the bare appearance of a litigant in a court room, packed with lawless mountainers, his destruction predestined. As to the administration of this Act in all of the State Courts from the lowest to the highest, it is not believed possible that this Court, the final Arbiter of Constitutional Rights, will hold that plaintiff in error was accorded "due process of law" and "equal protection of the laws," when his attempt to list was arbitrarily prevented and when *his offer to pay taxes* (largely in excess of what could possibly be due) was declined without reason given, *in order that forfeiture might be based on the pretense of his neglect to list his lands and pay his taxes.* And all the while, with the landowner ready and willing to pay, *the Courts did not assess the taxes*, a duty imposed upon them by the very same article enacted, ostensibly, for Revenue and Taxation, but construed by the Court below to be intended to "outlaw" titles to land (Record No. 223, fol. 166)—an intention approved by the Court below as "not only reasonable but highly politic" (*Id.*, fol. 189).

In reviewing this Article and the proceedings thereunder, it was stated to the Court below, that:

"Whereas, prior to the enactment of the above-mentioned Article III the appellant had already entered into contracts for the purchase of the titles under the earliest patents from Virginia granting the land (Amended Answer, Sec. 3) 'for the purpose of uniting under one ownership the titles, claims and interests of those deriving the same from said grants from Virginia and of consolidating the same with claims by adverse possession of the same lands in order to make a marketable title thereto for purposes of development of the resources of said lands' (*Id.*, Sec. 2), it appears that the officials of the Commonwealth have issued junior 'patents' of the same land, declared 'absolutely null and void' by the statute under which they purported to have been issued; the legislature has subrogated occupants paying taxes on land claimed under such bogus patents, to the lien and claim of the State against the true owner and, it is

claimed on behalf of such occupants, has also forfeited the title of the true owner for his failure to pay again to the State the same taxes that he was by the law of the State already obligated to pay to the occupant, the Statute for the attempted forfeiture and the proceedings thereunder having been obtained and prosecuted for their own benefit by claimants from the occupants who profess to be acting in the interests of the Commonwealth."

The lands whose title the court below seeks to confiscate are not the lands in the "bottoms" or adjoining the cabins in the mountains which have been enclosed or cultivated for the period which under the laws of Kentucky give a title by actual adverse possession. The title, which this enactment, as construed and enforced, seeks to wrest from the true owners and to bestow upon occupants of adjoining land, or those "in privity with such person as to the mineral or other interests conveyed" (*supra*, p. 16) were recently described by the same Judge who delivered the opinion in Case No. 223, when a few years earlier he was granting an injunction on behalf of one of the principal of these instigators against others who were also seeking to acquire claims, also adverse to those of the true owners: "*These lands are nearly all unenclosed forests*" (Pike Circ. Ct., Sept., 1902; Northern Coal and Coke Co. *v.* Nield, 29 Ky. L. R., 188).

The aspersions cast by the Court below upon the character, motives and conduct of the patentees and their descendants, and the prices paid for the grants, although irrelevant to the question whether the plaintiff in error should be despoiled, its counsel sought to answer, in the petition for rehearing (Record No. 223, fol. 199), by showing that many of the patentees were pioneers, members of the earliest Conventions and Assemblies—one of them afterwards Governor of the Commonwealth; and that the prices paid for these earliest grants of the land, proved to be far more than the lands were worth.

In 1788 Maine was selling land for one dollar per acre (Elliott's Debates, Vol. III, p. 351), and in 1820 the price of the public lands of the United States was reduced from

$2 to $1.25 per acre (Von Holst, Const. Hist. of U. S., Vol. II, pp. 179–180).

For nearly or quite a century after these patents were granted it was probably impossible to sell the land for as much as had been paid therefor; impossible even to lease it, since any settler might find neighboring wild lands, too far from the dwelling places of the owners to have an adverse occupation of the land known to them.

The "mere pittance" which the Court avers was paid was not, in truth, the consideration paid by the earliest grantees, but by junior patentees, who, under later Statutes, when the consideration had been reduced, acquired grants which were an injury to the true owners by clouding their title and creating the confusion which the Court below is now urging as a reason for confiscating it. As early as 1783, "warrants had been issued for more land perhaps than was to be found in the country [Kentucky]; certainly for more than was valuable," said Mr. Chief Justice Marshall in Hunt *vs.* Wickliffe, 2 Peters, 208.

It was with reference to the later junior grants at cheaper rates, that this Court, many years ago, said:

> "The unappropriated lands of Kentucky have been opened to entry and grant at a very cheap rate, which policy has led to abuses. *The clouds upon old titles by the issuance of new patents* to the same lands was the consequence and the citizens of other states are entitled to come into the courts of the United States to have their rights secured to them by the statute of Kentucky of 1796." (Clarke *vs.* Smith, 13 Pet., 195.)

But the merest pittance of all was one to which the Court below does not refer. That true mere pittance was five cents per acre (Am. Assoc'n *v.* Innis, 109 Ky., 595; 22 Ky. L. Repr., 1196; 60 S. W., 388) paid in recent years (in many instances long after rumors that a railroad was coming up the Big Sandy Valley) by occupants of adjoining lands and others to Kentucky officials for bogus patents of parts of the "unenclosed forests" now in question, such "patents" having been issued by Kentucky officials while the existence of prior patents from Virginia was so well known that no man's life was safe if

he consented to show the lines thereof. The bogus patents were issued by officials in the teeth of the prohibition of the statute under which they pretended to act and the issue thereof has been since declared to be a *misdemeanor* (Ky. Stats., § 926), and on them the courts of the Commonwealth have exhausted the vocabulary of indignation; so that the Kentucky Court of Appeals many years ago held that "a party in possession under such a patent, declared void by Statute of 1835, under which it is issued, "*stands just as he would had he never procured a survey or patent*" (1868: McMillan's Heirs *vs.* Hutcheson, 67 Ky. (4 Bush), 611, 615, 616, followed in 1884, Davidson *vs.* Coombs, 5 Ky. L. Rep., 812, 814; and patents issued by Kentucky officials since that time, for land previously appropriated by others, have been held by the Court of Appeals to be "*no title or color of title*" (Crate *v.* Strong, 24 Ky. L. R., 710, 712; 69 S. W., 857); *do not confer constructive possession* (Greer *v.* Bowling, 21 Ky. L. R., 1648–9, 56 S. W., 1229, citing Russell *v.* Doyle, 84 Ky., 386; Terry *v.* Johnson, 96 Ky., 95); are "*a nullity and amount to no more than a piece of blank paper*" (Nolen *v.* Hall, 82 S. W., 418; 26 Ky. L. R., 773, 774, citing Morgan *v.* Morgan, 20 Ky. L. R., 190; Connett *v.* Combs, 21 *Id.*, 837; Goosling *v.* Smith, 90 Ky., 157); "*no title whatever*" (Amer. Ass'n *vs.* Innis, 109 Ky., 595; 22 Ky. L. R., 1196, 1203; 60 S. W., 388, 392), and the issue of which, if the Commonwealth should assume to protect them, would be a flagrant violation of the Compact by which Kentucky solemnly promised to hold the rights and interests under the patents from Virginia valid and secure, and not to make any grants that should "interfere" therewith (*supra*, p. 98).

It is these five-cent-per-acre men who are claiming to be "occupants" of these lands about which they have done nothing, except in some cases to denude them of timber, and it is to confer the title to these lands upon them, and those "in privity" with them "as to the mineral interests," that the Court below is seeking to confiscate the title of plaintiff in error on the ground that those from whom it acquired title paid only between one and two

pounds per acre nearly a century and a quarter ago, and have done no more than the "innocent enough" occupants to improve them.

Some years ago the same judge who afterwards delivered the opinion in Case No. 223, in a dissenting opinion in the case then at bar, said:

> "This Court knows judicially, moreover, that before the adoption of the Revised Statutes nearly or quite all the lands of the State of much value for farming purposes had been appropriated, and that the *chief value of the residue consisted in the timber and mineral they contained.*"

Register *vs.* Reed, 72 Ky. (9 Bush), 103; 23 Ky. L. R., 769.

The Revised Statutes there referred to were enacted in 1852.

It is notable that Article III requires only a "claim," not even requiring good faith, so that a reward is offered to those who grasp what they know is not rightly theirs (*supra*, p. 219).

In brief, this article attempts to change the old sanctions of rights to land from title by deed to title by occupancy—not merely to the limits of what is in truth actual occupancy by enclosure or cultivation, but to the limits of any "claim derived from any source whatsoever" and made in good or bad faith (*supra*, p. 219).

The indefeasible seizin that under the common law passes to the grantee by the first grant of the Commonwealth could not be lost by an alleged "abandonment," even if it were not absurd to talk of an abandonment by the owner of "unenclosed forests" which he cannot approach without peril to his life from murderous adverse claimants.

Besides all this, the Court below itself admits that the legal title still is in those claiming under the earliest patents (Record No. 223, fol. 158), but seeks to divest it on the ground of the alleged "moral rights" of settlers (*Id.*, *Ib.*).

There is but one more charge worth notice against the remote ancestors in title of plaintiff in error.

In the petition for rehearing of Case No. 223 it was said:

"The Court assumes that none of the owners have ever paid taxes on their lands. There seems to be no evidence before the Court to support this statement, and we may safely assume that there was none before the Legislature.

The offense, according to the statute, is the failure for any three of five years preceding the act.

The taxes on such 'third rate' lands in the early days were, as they should have been, extremely small. The tax of two shillings per 100 acres was reduced retrospectively (2 Litt. L. Ky., 55). In 1797 the tax on third rate lands was nine pence per 100 acres (1 *Id.*, 653). In 1799 it was 12 1/2 cents per 100 acres (2 *Id.*, 316). In 1801 the tax on all lands was 15 cents for every $100 of valuation (5 Litt. L. Ky., p. 292, Sec. 1). In 1834 the rate was 10 cents on $100 of valuation (2 Moreh. & Br., p. 1389). In 1814 the whole revenue of the State required to be raised by taxation, real and personal, of all property of the entire State was only $225,000 per annum (5 Litt. L. Ky., 111). These wild lands on the slopes and tops of hills unfit for agriculture and far from railroads were of little value until recent years when the advent of a railroad seemed to be imminent. So little was due the State for taxes that the State has relinquished claim to all lands purchased by the State for taxes assessed in or prior to 1879 (Ky. Stats., Sec. 4038); and the State now retains a lien for taxes for only five years, and even this lien does not exist against a purchaser (*Id.*, Sec. 4021)." (Record No. 223, fols. 221-222.)

A release by the Commonwealth of its claim for arrears of taxes avoids any prior forfeiture for non payment. (Fulkerson *v.* Holmes, 117 U. S., 389.)

This, however, has not prevented the Legislature from making the payment of fifty years' taxes a condition of redeeming from the "forfeiture" under Article III (*supra*, p. 14).

If there were any culpability or remissness on the part of these heirs, scattered all over the country and ostracised from any use of their lands, because of the violence of occupants, the punishment at the most should have been by an orderly assessment, and if still delinquent, by a sale of their interests, the surplus of the proceeds of their lands to be paid to them.

Taxes on these wild lands were, as they should have been until very recently, a trifling sum, because taxation in Kentucky, as in all well-constituted states, was according to the value of property, and the expenses of the local government were for many years very small, and increased only with the increase in population that settled in the bottoms, where practically all the value of the property of all kinds in these counties was for many years; and also because taxation is generally intended to be somewhat in accordance with the benefits received from the government sustained by the taxes, and for all those years the owners of these lands and the lands themselves received but little benefit from the government, the expenses for public buildings, roads, etc., being confined almost entirely to the "bottom" lands and the inhabitants thereof; and the policing being necessarily insufficient to protect the owners of these wild lands from the animosity of the lawless. The increase in value of these wild lands has come, not from the settlers, but from the railroad that was attracted not by the settlers but by the coal and timber.

"A city has no power to tax property which derives no benefit from its government" (Louisville Bridge Co. *vs.* City of Louisville, 81 Ky., 189).

"Taxation being imposed in consideration of the *protection afforded* the individual and his property, the individual is personally charged with the tax. The rule is otherwise as to the unoccupied lands of non-residents, taxes upon such lands generally being a charge upon the land alone" (25 Am. & Eng. Encyc., 1st Ed., p. 117–118).

There was no "protection afforded" even against outlaws and murderers, and the true owners of these wild lands derived "no benefit from the government."

But, as was said in the petition for Rehearing:

"If the Commonwealth in the past had exercised its real police power in protecting the lives of those seeking to exercise the ordinary rights of property over the lands in these mountains, its representatives would perhaps not now be tempted to claim the exercise of a bogus 'police power' of 'outlawing' the titles of the true owners, for the benefit of the real outlaws who have been unrestrained by the police.

"It matters not, if the major part of the community are like the great majority of the people of other parts

of the Commonwealth—law abiding and with the good will of every just man that every other should have his own. A few murderous ruffians in each county, unrestrained by the law before commission of crime and unpunished thereafter, may effectually 'outlaw' all rights of person and property of those who cannot or will not, resort to the same methods." (Record No. 223, fol. 210.)

Another reason for the neglect of these lands by the true owners while the lands were of little value may, perhaps, be found in the rigors of the "Occupying Claimants Laws," enforced in defiance of the decision of this Court in Green *v.* Biddle.

Even the Commonwealth admits that taxes were paid up to the year 1825, which was the year when the Court of Appeals definitely refused (*supra*, p. 115) to conform to the decision of this Court in Green *v.* Biddle; and, in one case two years later, this law was enforced against the true owner of the land by awarding to the occupant not only all the true owner's land possessed by the occupant, but also by sale of all his other lands and property and that of his surety with a judgment over for deficiency (1827, Belshe *v.* Barrett, 21 Ky. (5 Mon.), 590).

Most of the true owners of these lands during the years 1901 to 1905 inclusively (the period of alleged delinquency sought to be punished by Article III) were non-residents and the statute in force during all these years was the Act of March 17, 1900 (Ky. Acts 1900, Ch. 10, p. 39), which provides a penalty of $50.

The plaintiff in error said, in the Court below:

"Many of the heirs of the patentees, notwithstanding their honorable lineage, are poor, the consequence perhaps at least in part of the purchase by their ancestors from Virginia of these lands for a price much more than they were worth at that time or for many years thereafter—a price which with interest thereon would now amount to an immense sum. In many cases neither they nor their ancestors have received any return or compensation of any kind therefor. Prevented by the violence of some of the settlers from entering upon the lands even to survey them; prevented from selling or even leasing to settlers, because any settler could find other lands in the locality too remote from civilization to have his adverse occupation

known to the true owners, and could procure from complaisant county officials a 'patent' for anything he wanted without regard to whether or not the land had been already granted by Virginia, is it not enough punishment of the true owners for 'the crime of having the better title to the land' (Gaines *vs.* Buford, *supra*), that the shortened Statutes of Limitation of Kentucky have deprived them of a part—the Occupying Claimants' laws have subjected the remainder to liens for improvements made by others without their knowledge or consent—the tax laws have added another lien for taxes paid by occupants and lienors, and the Champerty acts have prevented them from mortgaging the lands to procure means for their recovery or even means to pay the liens for taxes and improvements? Is it necessary that the Commonwealth of Kentucky, grown great and prosperous, should now be a party to the confiscation of the remaining interests of the heirs of pioneers who risked life and fortune in the defense of her infant weakness and poverty—a confiscation with a haste so indecent as to give its victims no time for defense and a ruthlessness so great as to disregard (perhaps for the first time in the history of the Commonwealth) the interest even of married women, children and the insane, of all of whom the Commonwealth is supposed to be the ultimate guardian and protector?"

So much, it seems, may be said in fairness for the former owners of these lands whom it is now sought to punish as criminals. But if they were in worse plight how can their alleged delinquency be imputed to the plaintiff in error? The punishment of forfeiture, like a bolt from the blue, unforewarned, would have been unconstitutional as well as monstrously unjust if imposed upon the alleged delinquents. It is still worse when sought to be imposed upon the plaintiff in error, whose incorporators and their associates had set forth to try to clear the titles to the lands. If there had been a delinquency and a valid sale of the title under the ancient patents, the plaintiff in error could have sought to acquire the title of the purchaser at the tax sale. But the land has not been so sold and the Court below is now seeking to confiscate the titles which the plaintiff in error purchased while relying upon the law as it then existed in the Statutes and had been expounded in many prior decisions of the same Court.

After the expenditure of much time, effort and money for the purpose in view, the plaintiff in error is met by an attempt to forfeit all the titles so collected, the attempt being made in alleged pursuance of one article of an Act of the Legislature which is in glaring inconsistency with the general laws included in the same Act.

Even if the alleged delinquency of the remote grantors of the plaintiff in error had been much greater than has been charged, it would be still impossible constitutionally to forfeit the title of plaintiff in error, who did not acquire title till after the alleged delinquencies to settle conflicting titles by a plan of doing patiently and equitably what Article III attempts to do " in a summary manner."

The evils of conflicting claims of titles in this locality are doubtless great and need a remedy. The plaintiff in error has chosen one way; the instigators of Article III have sought to find another. The way of the plaintiff in error is, it is believed, that which has been heretofore followed generally by those who have succeeded in settling titles and opening lands for development, in either Kentucky or West Virginia; to wit, first to acquire the legal title under the earliest patents and then to settle with adverse occupants of the land. The incorporators of the plaintiff in error had set out upon this way long before the enactment of Article III. The method of the plaintiff in error seeks to settle conflicting titles by compromise, by giving to each his due and by uniting all conflicting claims under one ownership. The methods of the instigators of Article III seek to reach the same end by exterminating all the rights of the parties to one of the two sides of a controversy.

The Article would be needless for any honest purpose even if it were not unjust and unconstitutional.

(*a*) *It is not needed for purposes of revenue* as appears on the face of the proceedings in the cases at bar where the officials of the Commonwealth have been desperately trying to avoid the acceptance of offers of revenue from the plaintiff in error, as if its money were infected with the plague.

Even if the Article were intended to collect revenues the argument that tax sales are less expeditious and certain was answered years ago by the Court of Appeals of Kentucky.

"It is urged that scarcely a single tax title under such "a rule can be maintained; and that it will be almost "impossible for the State to collect its revenue. We "are, however, unwilling to suppose that its officers "cannot at least learn to comply with the law if they are "not now doing so; and it is only by the preservation of "such a rule that the fundamental rights of the citizen "can be maintained." (Maguiar *v.* Henry, 84 Ky., at p. 13.)

Moreover, as already stated, the laws governing proceedings to divest an owner's title by a tax sale are in fact simpler and more easy to comply with than any statute for judicial proceedings to forfeit, if the officers of the Commonwealth or of the Counties, moved by a sense of public duty, will conduct proceedings to sell land for taxes with the same care that has been given to the proceedings to forfeit in the cases now before this Court by the instigators of Article III moved by personal greed, as they hope to be its principal beneficiaries.

(*b*) *Article III is not needed to protect the true rights and equities of adverse occupants* to the extent of their actual possession, for these are hedged about with protections, (*a*) by the Champerty Acts, which were enacted to counteract the decision in Green *v.* Biddle (*supra*, p. 111); (*b*) by the "Occupying claimants acts" which have been always sustained by the Courts of Kentucky in defiance of the judgment of this Court in Green *v.* Biddle (*supra*, p. 115), and which were enforced in one case to the extent of forfeiting not only the true owners interests in the land but also the title of his bondsman to all the other lands of the latter (*Id.*, p. 298); (*c*) by the limitation acts shortening the period of actual adverse possession required under the former Virginia law; (*d*) by the laws which expressly grant to an occupant a lien on the land enforceable against the true owner to recover taxes paid by the occupant (*Id.*, p. 232); (*e*) by the laws for divesting the true owner of his

land by a sale for taxes, the deed of the officer making the sale being by the law of Kentucky *prima facie* evidence of the regularity of the proceedings and the statutes throw the burden of proof on the owner to show that his title has not been divested; and also giving the purchaser at a tax sale a lien not only for the purchase money and interest but also for taxes paid, expenses for improvements and caring for the property (*Id.*, p. 233); and (*f*) by "guns" in the hands of the lawless who recognize no rights but their own.

All these things, however, have not been enough to satisfy those who wish to obtain without compensation the whole of the "rights and interests" which the Commonwealth of Kentucky has solemnly agreed to protect.

(c) *The Article is not needed to settle titles.*

The plaintiff in error was following the ordinary method of settling titles when it was halted by this Article III. There is no evidence that conflicting titles have ever been settled in any other way. In the argument in the Court below one of the counsel for the instigators of Article III misled the Court by presenting a glowing picture of what he stated to be the conditions of prosperity in West Virginia due to an alleged condition of settled titles resulting from the forfeiture acts. This picture was purely imaginative, wherein the artist, as he increased the brilliancy of color, departed more and more from truth to nature. In their origin the forfeiting acts of Virginia were intended to apply to that part of the State which is west of the Allegheny Mountains, and now mainly in West Virginia. It does not appear that titles have been so much settled as they have been unsettled and disturbed by them, since it seems an owner may lose his land because he has lost a tax receipt and the records of the tax department will become as important to the owner of land as the recording office for deeds, for it seems that under these forfeiting acts the burden of proof is shifted before the outset, and the true owner must show as part of his case that the owner has paid all taxes, not only during the years of adverse occupation but for all previous years. This is much worse than a shortening of

the statute of limitations to five years (which the legislature may hereafter still further reduce); and notwithstanding all assertions it has not yet been shown that the acts of West Virginia have settled any titles to land which were not already settled under the time-honored statute of limitations.

This Article was needed by its instigators because they feared that this Court would not sustain their claim of title to "unenclosed forests" claimed under bogus patents (*supra*, p. 294); but it is *needless for any honest purpose, and is also void;* for the reasons urged to sustain its validity will not bear examination any better than the real purposes for which it was enacted. It is not a constitutional exercise of the power of taxation (*supra*, p. 249), nor of the real police power (*Id.*, p. 261), and is not similar to the laws of West Virginia (*Id.*, pp. 200–225) and was not in principle approved in the decision of this Court in King *vs.* Mullins (*Id.*, p. 170).

The West Virginia doctrine, as established by Simpson *v.* Edmiston, *taxes two or more hostile claims while the law protects but one*, and the State trades upon the uncertainty of the claimants by collecting full taxes from each until the courts have awarded the prize in the lottery of litigation; but the courts of Kentucky and of other States have held statutes requiring payment for improvements or taxes on property as a condition precedent to litigation relative thereto to be unconstitutional as providing for a sale of justice (Gaines *v.* Buford, 31 Ky. (1 Dana), at p. 497; State *v.* Gorman (Minn.), 2 L. R. A., 701; Wilson *v.* McKenna, 52 Ill., 43). The new Kentucky doctrine, however, by subrogating the adverse occupant to the State's claim requires that the true owner shall pay for "the other man's" ticket and then lose the prize if he does not also buy one for himself. This seems to be not only a sale of justice but a charging of the true owner double rates. The Article also gives him no chance to redeem and even the so-called "purchasing back," if not impossible (*supra*, p. 15), must be done, if at all, before he can ascertain whether the forfeiture is constitutional, which makes the Article itself unconstitutional (*Id.*, p. 243).

It is claimed that this Article III attempts to "regulate rights." But so does a buccaneer. In the cases at bar the Commonwealth of Kentucky has been placed in the position of a highwayman who, when his victims offer their purses, refuses to receive them on the ground that he would thereby waive the right, upon which he insists, to a deed of all their property.

Notwithstanding all that has been said in attempted support of a *system of forfeiture* for delinquency, whether real or wrongly imputed, in payment of taxes, it still remains true that the penalty of forfeiture is *immensely worse than a sale*, and is at once needless, iniquitous and dangerous.

If the courts are stringent in requiring a rigid compliance with the *statutes* before an owner may be deprived of his land by sale for taxes, is there any reason why the courts should be more lax in requiring a rigid compliance with *constitutional* obligations before either the legislature, the judiciary or the other officers of the Commonwealth should be enabled to forfeit an owner's title without even a sale, and with no return to him of even the surplus proceeds on a sale?

It will hardly be denied that a statute providing for the sale of land for the non-payment of taxes and the payment of the entire proceeds to the occupant would be void, and if that be true, it seems that a statute taking the land from the owner and giving it to the occupant must also be held void. A tax could not be levied for the benefit of the occupant, and yet there is no difference in principle between the imposition of such a tax and the appropriation to the occupant's use of the proceeds of a tax levied for general purposes.

The passage from Judge Cooley's work, first cited in the opinion (Record No. 223, fols. 174-5) is separated by the Court from its context, and is in a paragraph which concludes "Only cases *where regulation is the primary purpose* can be specially referred to the police power" (Cooley on Taxation, 3d Ed., Vol. II, p. 1127); and the other citation from the same author (Record No. 223, fol. 185) is from a discussion which after contrasting

the proceedings by forfeiture and by sale for taxes concludes that "if the owner is condemned without a hearing in the one case, he is in the other" (*Id.*, Vol. II, p. 862) and is followed by a statement that "if by forfeiture is understood the vesting in the state a title which shall be absolute and beyond dispute the question presented is different" (*Id.*, p. 863). Although the passage is not clear, the author seems to assume that in either case there will be a fair chance to redeem. The dictum that seems to minimize and even confuse the distinction between a forfeiture and a sale is, of course, unsupported by a single authority.

Does it need argument to show the difference between a forfeiture which takes all "in a summary manner" and a sale which returns to the owner all the proceeds except the amount of the tax and a reasonable penalty, and also affords a reasonable opportunity for redemption?

Even if this Article III were, what the facts show it is not, an act to enable the Commonwealth to have its lawful revenues, it would still remain unconscionable, because imposing penalties far in excess of the just punishment of a fault of omission of a citizen—his default in paying taxes, which is sometimes the result of ignorance, inadvertence or misfortune, and in any event should not be punished more than by the imposition of a heavy fine and the loss that he will almost inevitably suffer by a forced sale to pay the taxes and the fine. *But the surplus of proceeds of sale should be his.* Why for such an omission should he be punished more severely than if he had committed an overt act of treason against the State by giving aid and comfort to its enemies?

The taxing power is the most dangerous power of government; an absolute forfeiture without return of surplus to the owner is the most pernicious abuse of that dangerous power, and this Article III. and the proceedings had under it, constitute probably by far the most atrocious example of such pernicious abuse that can be found on the statute books or Court records of any State or country in the world.

This Article III, extended to cases where adverse occupants have paid the taxes, is even worse than an attempt

at unlawful duplicate taxation. It is an attempt to forfeit, without compensation, the owner's title, because he does not, himself, state that he is obligated to pay an unlawful duplicate tax, and offer to pay and actually pay it.

The officials of the Commonwealth of Kentucky having made a second sale and obtained a second price for the same land, already sold and granted by Virginia, are now pretending to seek to obtain two full sets of taxes on the full value of the same land, thus availing themselves of a former iniquity as a means to perpetuate another; but it is clear that the real purpose is a third iniquity—not to collect duplicate taxes, but to confiscate the title granted by Virginia, and thus to make room for those granted by officials of Kentucky, in violation of the Compact and the statutes of Kentucky.

To say that the intention of Article III as applied in the case at bar is both to increase revenue and to "regulate rights" is to mask a policy of robbery in behalf of the instigators of the Article under the guise of an honest effort to attain the true ends of the State, and to cast upon the victims the odium of failure in duty, when they are merely seeking to save themselves from spoliation. Whenever this forfeiture law succeeds in extorting an unfair duplicate tax it does not "regulate rights." Whenever, on the other hand, all but one of the hostile claimants refrain, in despair or disgust, from taking their chances in the lottery, these rights are not regulated but confiscated. A day in court thereafter is merely a mockery where the courts sustain as valid a statute that has already destroyed the rights of property to save which a day in court would be of value.

There has been much ado about "a day in court," but the vicious part of these forfeiting acts is not the lack of a day in court, nor is the most vicious feature the tying of the hands of a court of equity when a day in court is given, but the depriving the owner of a fair chance to redeem and in case of failure to redeem the depriving him of the surplus of the value of his title after the state has received the tax and cost of proceedings and a reasonable penalty for the delinquency. No reason can be found for forfeiture instead of a sale with return of surplus to the

owner except that the State, or the voters who elect the officials of the government, or those "influential" with the legislature, want "something for nothing."

This statement is not an affront to the People of Kentucky. There is no evidence whatever that the People of the Commonwealth approve of this Article III.

This Court, it is respectfully submitted, did not hold in King *v.* Mullins that there was a sufficient due process of law because there was a hearing, but because there was a *fair* hearing and a *fair chance to redeem.* A day in Court, instead of being always a shield against unconstitutional wrongs, may become the sword that inflicts them, of which it is respectfully submitted, the proceedings in the cases at bar are instances where this vicious Article III, which is itself unconstitutional, has been construed by the Court not according to the expressed intent of the Legislature, but according to the real intent of its instigators (*supra*, p. 246), in violation of the pledged word and obligation of the compact of the Commonwealth (*supra*, pp. 154–174), and has sought to punish *ex post facto* the plaintiff in error for pretended delinquencies before even its incorporation and of which it could not be, and even its remote grantors were not, guilty; in doing which it has also denied due process and equal protection of the laws in ways too numerous to be completely set forth, but of which very many instances have been shown (*supra*, p. 246) and has attempted to justify the whole by the assertion that the Act and the proceedings thereunder conform to those of a neighboring State, although the two are separated in very many different ways by the bulwarks of Constitutional law (*supra*, pp. 210–225); and has concluded by imputing to this Court an approval of such doings by referring to a decision of this Court which not only lends no countenance to them, but on the contrary contains, implicitly, a declaration that they are void (*supra*, pp. 200, 170); and finally has sought to construe the article to be an exercise of both the revenue power and the police power although in its application it could not be both, especially as applied to the plaintiff in error as is evident from the proceedings which show that in order to enforce

it to the extent of forfeiture it became necessary to refuse revenue (*supra*, p. 34); and although either as an attempted exercise of the revenue power or of a so-called "police power" it seeks to propagate a new doctrine that is "a peril to the Republic" (*supra*, p. 288).

If these forfeiting statutes tie the hands of the Court so that "a day in court" becomes almost a farce, the Court merely determines whether the conditions of the Statute exist in the case then at bar. The Court is shorn by the Legislature, or by itself, of those powers of equity which for ages past have been thought necessary to guard both the rights of those under disability who cannot help themselves and the rights of all who from time to time are the victims of the fraud, accident or mistakes which experience has shown to be forever incident to human affairs.

An enactment so subversive of constitutional rights required new doctrines to support it; for it is clear that the power exercised in the cases at bar is not any power of government ever yet avowed by this Court in expounding the law of the Constitution during much more than a century.

It is a power that brushes aside the obligations of Constitutions and Compacts and the Judgments of this Court; sophisticates the minds and corrupts the morals of the people by purporting to protect the public interests while intended for the private and nefarious purposes of its instigators; under a plea for revenue masks a purpose to "outlaw;" and under the guise of "regulating rights" strikes down with a high hand all that "interfere" with the interests of those sought to be favored—a power whose exercise the Court below says it would "not be tolerable" to interfere with (Record No. 223, fol. 188), but which the Court itself, it is respectfully submitted, extends by construing an Article which the legislature says was intended to raise revenue, as being really intended to outlaw titles—a power greater than the "war power" which can forfeit only against a public enemy or for overt acts of treason (*supra*, p. 284), not the revenue power since that power cannot be thus

abused (*supra*, p. 249), and the revenue which this power purports to seek is refused in order to confiscate titles; nor is it the "police power," for the terms and the context of the Article show no such intention of the legislature, and the judiciary cannot by construction make such an intention (*supra*, p. 262), and the police power has a scope only within limits which this Court has fixed (*supra*, p. 265), and the power here exercised is not only greater but a sworn foe of the police power, since the "regulating of rights" in this way—by wresting from those who have to bestow the spoils on those who want—was the chosen function of Robin Hood, which, although it won for him a measure of applause from those who wanted but had not, made him forever an "outlaw" in the eyes of the true "police power" of the common law.

This power transcends that Constitution that the people have set up as a safeguard against their own passions and the misrepresentativeness of their representatives and the misfeasance of their other governing servants. For, as this Court has said, "the Federal limitations upon State power are founded upon the desire to protect life and property from the sudden and strong passions to which men are exposed" (Fletcher *v.* Peck, 6 Cranch, p. 138), and again: "It was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard. . . . The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State" (Cummings *v.* Missouri, 4 Wall., 277, 322).

And so, too, the Court of Appeals of Kentucky:

"I intend no disrespect to the Legislature in supposing that impossible conditions might be prescribed, in times of excitement, for the purpose of forfeiting estates. That has been done in the act in question. Thus, by comparing the Act of 1824 with the Constitution, I find that while the Legislature are expressly prohibited from passing laws to forfeit the estates of attainted traitors and felons, except during life, they have undertaken to

forfeit forever the estates of those who have been guilty of no crime, *unless it be a crime to have the better title to a tract of land held adversely by another!*" . . . "If the power attempted to be assumed is a wholesome one, and was wisely and equitably exerted in the given instance, it will be matter of regret that other and higher considerations induced the framers of the constitution to withhold from the Legislature the power of giving such wholesale and summary redress. If, on the contrary, the existence of such power would be noxious to the common weal, and its exercise in this instance was oppressive, unwise, unequal, unjust, then it will be matter of congratulations that the wisdom of the constitution has secured the community against such extensive oppression, and that the very extent of the evil intended, is of itself a security against its perpetration."

Gaines *v.* Buford, 31 Ky. (1 Dana), 491, 512.

And again:

"If such results as this act seeks to accomplish could be reached by the methods it prescribes, it would tend directly to establish the union of all powers in the Legislature. There would be no general permanent law for Courts to administer or men to live under. The administration of justice would be an empty form and idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country."

City of Louisville *v.* Cochran, 82 Ky., pp. 35-36.

Truly a transcendent power, for it transcends not only the Constitution of this Nation but also that of the Universe governed according to laws of right and wrong and not by the law that "might makes right"; and hence this new power is opposed to the counsel of the great Kentuckian and American who said "Let us have faith that *right makes might* and in that faith let us to the end dare to do our duty as we understand it."

A new thing should have a new name and the Court below, it is respectfully submitted, seems to have brought forth both with the same breath. For that Court divines that the legislative intention was to "outlaw" the titles of the plaintiff in error (Record No. 223, fol. 166) and

approves of that intention as "highly politic" (*Id.*, fol. 189).

In the petition for rehearing it was said:

"The intentions of a Legislature, where the purpose is not clearly shown by the letter of the Act, are not to be sought in the construction placed on an Act by those who may execute its provisions, nor can such intention be always found by examining, as the Court does, the supposed evils to be remedied. The character of the remedy as related to the supposed evils, is also a proper subject of consideration in attempting to determine whether the Legislature, which must be presumed to be a moral body, *could* have intended to adopt such a remedy."

"According to Noah Webster's Dictionary (citing Blackstone) 'to outlaw' means 'to deprive of the benefit and protection of the law; to proscribe,' which definition, while it shows the accuracy of the Court's expression, makes still more glaring the atrocity of the alleged legislative purpose." (Record No. 223, fol. 237.)

The same authority defines "politic" to mean "pertaining to or promoting a policy . . . ; adapted to its end right *or wrong;*—said of measures . . . ; ingenious in devising a system of management; *devoted to a scheme or system rather than to a principle* . . . said of persons." This is doubtless not the meaning that the Court would have selected from those there stated. Nor does the plaintiff in error charge that it accurately represents an intention consciously and deliberately chosen by the legislature or the Courts below; but it is respectfully submitted that the application against the plaintiff in error of this Article III as construed and enforced is as unconstitutional as if the intent had been most malicious, and that this Court condemns and nullifies unconstitutional acts irrespective of intentions.

"It is not necessary that the officers in so discriminating, should have intended specifically to injure the appellee or other railroad companies. It is sufficient that by their action they denied the appellee the equal protection of the Constitution and laws of the State. The intention with which the acts were done is of no consequence. Such deliberate action on the part of officers charged with the enforcement of the law must be held to be the act of the State, and the appellee was

entitled to relief against the enforcement of the excessive assessment. Raymond *v.* Chicago Union Traction Co., 207 U. S., 20; Chicago, B. & Q. Ry. Co. *v.* Board of Com'rs, 54 Kan., 781, 39 Pac., 1039; Andrews *v.* King Co., 1 Wash. St., 46, 23 Pac., 409, 22 Am. St. Rep., 136; Taylor *v.* L. & N. Ry. Co., 88 Fed., 265, 31 C. C. A., 537."

Lively *v.* Missouri, etc., Ry. Co., 120 S. W., 857.

In approving this Article III as "highly politic," the Court below, it is again respectfully submitted, is again in conflict with this Court, which has declared that "Policy and humanity are dangerous guides in the discussion of a legal proposition. He who follows them far is apt to bring back the means of error and delusion" (Edwards *v.* Kearzey, 96 U. S., 595, 610).

"Because the ethical end is the highest end, it is paramount over other ends, and thus also, in matter of taxation . . . there can be no *true* social *policy* in any of the social relations of life that is not based on ideas of *justice*. Justice is the foundation of a permanent social order and a permanent social peace. Only upon the grounds of *a 'policy' best known to the 'politician'* or through the want of a wholesome influence at the ballot box of a powerful minority (unless perchance the masses are soothed by ignorance, lethargy or hopelessness) can a system of taxes long endure that is recognized by all competent judges as full of injustice" (Weston, Principles of Justice in Taxation, p. 71, citing Ely, Taxation in American States and Cities," and Seligman, "The General Property Tax" in Essays on Taxation).

The plaintiff in error is struggling for its life, as the titles sought to be confiscated are almost all its assets acquired after much expense of time, labor and money for an honest purpose. But it seems that the questions now to be determined by this Court reach far beyond the interests of the plaintiff in error or of the locality or Commonwealth immediately concerned. For the Court below has sought to sustain an intention to "outlaw" those titles on the ground that "it is not tolerable . . . that acts of the legislative branch should stand or fall according as they appealed to the approval of the judiciary" (Record No. 223, fol. 189).

Many of the States have taken their turn, one or two or a few at a time, in the effort to stifle the voice of this Court when the Constitution that it guards stood in the way of some pet project; but a majority of the States have always met all such appeals for help either with strenuous opposition or with indifference (Ames, State Docts. on Federal Relations, *passim*). When Kentucky took her turn, of all the States that answered her call of 1799, almost all denounced the doctrine and many of them then stated that the power of deciding upon the constitutionality of federal laws was vested by the Constitution in this Court (McElroy, Kentucky in the Nation's history, pp. 250–251). These utterances of legislatures, some years prior to the decision in Marbury *v.* Madison seem (like some prior decisions of the courts of some of the States) to have been unknown to or forgotten by some of those who have taken part in "the almost continuous conflict over this assertion of this right by the judiciary in the United States . . . to declare legislative acts void" (Haines Conflict over Judicial Powers, Pref., p. 5); who seem also to have failed to note or forgotten that the right of the judicial power to declare acts of legislature void when they are so had been asserted by Chief Justice Hobart and Sir Edward Coke and others in England centuries before, and in various of the State Courts years before, the decision of Marbury *vs.* Madison, and had also been foreshadowed in the Federalist and discussed before the adoption of the National Constitution (Haines, Op. cit., pp. 17–41; and that half a century before the Colonies threw off the yoke of the Crown of Great Britain, the Privy Council had not only declared "null and void an Act of a Colonial Assembly but had also reversed and set aside" judgments of the Colonial Courts made thereunder (Winthrop *vs.* Lechmere, 1 Thayer, Cas. Const. Law, 34, 38). and that it was even in those days contended that the Privy Council thereby merely relieved from the oppression of a Court . . . acting without any legal jurisdiction under the pretended authority of an act of assembly which being contrary to law and to their charter was in itself null and void (*Id.*, pp. 39, 40, note); and that seven years before the Virginia-

Kentucky Compact of 1789 the Court of Appeals of Virginia had declared a resolution of the House of Delegates to be void—and a majority of the Judges were of opinion that the Court had power to declare any Act of the Legislature to be void (1782, Commonwealth *v.* Caton, 4 Call., 5; Thayer, Cas. Const. Law, Vol. I, pp. 55, 62).

Later the uneasy Spirit of Kentucky, this time in wrath with the decision of this Court in Green *vs.* Biddle, again tried to limit the power of this Court, for which purpose the legislature "resolved that this legislature, ought as the first measure to avoid the oppression and degradation inflicted by the opinion (in Green *vs.* Biddle) upon the State of Kentucky, to present to the Congress of the United States, a temperate but firm remonstance against its doctrines, and therein to call upon the nation to guarantee to the State its co-equal sovereignty with the States which compose the union, and also to request Congress therein so to organize the Supreme Court of the United States that no constitutional question growing out of the Constitution of the United States or the Constitution of either of the States involving the validity of the State Laws shall (not) be decided by said Court unless two-thirds of all the members belonging to said Court shall concur in such decision" (Ky. Acts 1823, p. 516).

To many it would seem a calamity if this Court should be powerless to arrest the spread of a policy of confiscation which starting in West Virginia, as a remedy which seems far worse than the disease to be cured, may, if not soon halted, spread to other States, take other forms and pass on to other things. Upon this general question counsel for plaintiff in error have not the duty, and hence not the right, to urge this Court. But when to the West Virginia doctrine of confiscation it is attempted to add this new Kentucky doctrine of "politic" power and to apply the doctrine as in the cases now at bar, the plaintiff in error comes before this Court as a party, not merely aggrieved, but robbed to the extreme of destitution.

If it be true that the "judicial authority (to declare enactments unconstitutional) is being challenged in such a

manner as to make it again the subject of political controversy" (Haines, Conflict over Judicial Powers, p. 180), may this Supreme Court never relinquish in any degree its great power. Somewhere the power must be, and if from here it ever goes, back here it must at last come if, in this broad land, the fundamental rights of men to life, liberty and property are to be determined by one law and not to change with the meridian; a law made stable by the National Constitution, construed by those whose outlook is upon the whole nation and whose eyes scan even its relations to other sovereignties, and not dependent upon the whims of every Legislature. If a Legislature can "regulate rights" by such an exercise of "politic power," the courts need be called on to decide questions only when both the litigants are either poor or decent. There are many who are neither. From the judicial forum the scene will be shifted to the Legislature's lobby, where the voices of reason and of justice may meet ears made deaf to them by the whispers of "politic" (or other) "influence."

Then will there be indeed a "sale of justice," or of something reckoned to be "just as good"; and the labor which this Court through so many years has bestowed upon the constitutional safeguards of rights will prove to have been needed only because the parties had not availed themselves of the "politic power."

For if titles to land may be exterminated by this weapon wielded at the pleasure of an ephemeral legislature, and with which the judiciary declares it would "not be tolerable" to interfere, what rights are safe?

The welfare of Kentucky and of the Nation requires that this enactment and the judgments thereunder should be declared void.

All of which is respectfully submitted.

SAMUEL HOWLAND HOPPIN,
EUGENE M. BERARD,
JAMES H. HAZELRIGG,
WILLIAM JACKSON HENDRICK,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1910.

Office Supreme Court, U. S.
FILED.
OCT 24 1910
JAMES H. McKENNEY,
CLERK.

EASTERN KENTUCKY COAL LANDS CORPORATION,
Plaintiff in Error,
vs.
THE COMMONWEALTH OF KENTUCKY

No. 47.

EASTERN KENTUCKY COAL LANDS CORPORATION,
Plaintiff in Error,
vs.
THE COMMONWEALTH OF KENTUCKY.

No. 48.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

Brief and Argument for Plaintiff in Error.

HANNIS TAYLOR,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1910.

EASTERN KENTUCKY COAL LANDS CORPORATION, Plaintiff in Error,
vs.
THE COMMONWEALTH OF KENTUCKY. } No. 47.

EASTERN KENTUCKY COAL LANDS CORPORATION, Plaintiff in Error,
vs.
THE COMMONWEALTH OF KENTUCKY. } No. 48.

BRIEF FOR PLAINTIFF IN ERROR.

I.

Statement.

Counsel who have been engaged in these cases from the beginning have filed here a brief of 315 pages, with an index, in which every question of fact and law involved has been very ably and exhaustively presented. In the light of that larger statement, and in perfect harmony with it, the effort will be made herein to condense within a much narrower compass certain questions of fact and of law which stand upon the threshold of the inquiry. These cases present for review, because of

conflict with the Federal Constitution, the judicial act of the highest Court of Kentucky "in authoritatively construing and enforcing" Article III of an Act passed by the legislature of that State in 1906, entitled "An Act relating to Revenue and Taxation," consisting of 19 articles and 318 sections. From a brief filed by the Attorney-General of Kentucky in the Court of Appeals in Case No. 223 it appears that Article III was a new creation interpolated into a preexisting—

> "complete and general system of law for the assessment of all lands in this Commonwealth, when the owner has failed or omitted to list the same for taxation."

In the language of the brief in question—

> "Article 3 of said chapter is in conflict with this general system from beginning to end. It is sandwiched between the general provisions of the law and is *entirely new.* Either the general provisions of the law or this special law must be held invalid because they are inconsistent; both cannot stand together."
>
> Brief of Attorney-General, p. 7.

The brief in question also expressly declares that Article III

> "is in conflict with both the State and Federal Constitutions."

In the opinion of the Court of Appeals (Record, 47, pp. 80-108) we are told in no uncertain terms what were the motives prompting the passage of "this special law," this "entirely new" creation known as Article III. That Court bluntly avers that the *primary* purpose of this special law was "to outlaw" a certain class of land titles—its *incidental* purpose to collect revenue. After reviewing the history of the land titles in question the Court says (Record, pp. 94-95):

> "Thereupon Article 3, of the Act of 1906, was most deliberately adopted. * * * Article 3, as quoted above, was in this deliberate manner proposed and adopted. There can be no doubt that the Legislature

> determined *to outlaw these dormant titles*, and thereby protect the treasury and increase the State's revenues. Nor can there be doubt that the legislature purpose was to proceed carefully and in that manner that would satisfy the requirements of the Constitution of the State and of the United States. The Legislature did not intend to deal tenderly with a situation that had become aggravating in its merits; it realized that sometimes sternness is justice, and further leniency injustice."

In order to execute that novel and stern policy of oulawry or confiscation the Legislature resolved to attempt to extinguish a certain class of land titles by mere "legislative fiat." Such is the language of the Court of Appeals:

> "If he did fail, then the judgment will carry into effect *the* **legislative fiat** *that his title shall be forfeited to the State.*"

The immense constitutional importance of the admission that the *primary purpose* of the special law in question was, by "legislative fiat," to outlaw or extinguish land titles will be emphasized hereafter.

The plaintiff in error is the owner of large tracts of land in four counties held under such titles as were singled out for outlawry by Article III. It was incorporated under the laws of Virginia in February, 1906, and, in the language of the Court of Appeals:

> "Proceeding under Article 3, of the Act of 1906, appellant, claiming to be an owner of certain patents issued upon Virginia warrants prior to 1789, petitioned the County Courts of Pike, Floyd, Knott and Letcher, to list for taxation against it 275,235 acres of land in Pike County, 88,215 acres in Floyd, 55,020 acres in Letcher, and 29,058 acres in Knott, aggregating 447,528 acres."

Fearing a possible cloud upon its title and other evils that might result from an attempt to enforce the provisions of Article III, by means of such proceedings as those in No. 48, plaintiff in error, while regarding the special law in question as

obnoxious to the Federal Constitution, attempted to comply with its terms by listing its lands. It also offered to pay taxes on all its lands. On the hearings of the petitions to list in the Country Courts or Circuit Courts, counsel for plaintiff in error produced and offered to read in evidence the assessor's books and moved the Court to assess the total of acres listed by the plaintiff in error for assessment. In that way it appears that the aggregate upon which the plaintiff in error thus offered to pay taxes was nearly 440,000 acres in the four counties and the total amount nearly $44,000, although it was certain that much of this land had been lost to plaintiff by adverse possession. And yet, despite all its efforts, plaintiff in error has been denied the right to list its lands and to pay taxes on the same by

> "the judicial act of the highest Court of the State, in authoritatively construing and enforcing its laws"
> Twining *v.* New Jersey, 211 U. S., p. 90.

in such a way as to confiscate by "legislative fiat" its lands, without due process of law, and in defiance of other provisions of the Constitution of the United States.

II.

The Question of Jurisdiction.

Do the records in these cases brought here by writs of error present in proper form the several Federal questions upon which this plaintiff's contentions depend? Section 28, Article III, provides that

> "It shall be the duty of the County Court to decide upon said application [to list] in a summary manner, upon such evidence as may be offered. * * * Either the petitioner or the Commonwealth, feeling aggrieved by the finding of the County Court, shall have the right to take an appeal, within thirty days after the entry of the finding of the County Court to the Circuit Court for said county, in the manner that other appeals are taken, except that no bond shall be required of the Common-

wealth. It shall be duty of the Circuit Court to hear and determine said application *de novo*, and to give it precedence over all other civil business in said Court."

It thus appears that the Circuit Courts, charged with the duty of hearing such applications *de novo*, were the local forums in which such applications were heard judicially in the first instance. In each of the four Circuit Courts in question the validity of Article III was directly assailed, and in each it was directly upheld. It was upheld in the following form in the Letcher Circuit Court:

> "Upon consideration of the demurrer of the Commonwealth to the petition and application, and its motion to dismiss the same, the Court is of opinion and adjudges that Article III of an Act of the Legislature entitled 'An Act relating to Revenue and Taxation' approved March 15, 1906, and being Chapter 22 of the Acts of the Legislature of the Session of 1906, is a lawful exercise of the legislative power of this State."
>
> No. 47, Record, p. 2.

The same form is substantially repeated in the judgments of the Circuit Courts of Knott, Floyd and Pike counties (Record, pp. 22, 50, 68). The Court of Appeals has held (Record, pp. 95–96) that an appeal lay from the Circuit Courts directly to that Court in these tax applications. After reviewing the statutes its conclusion is thus stated:

> "We are of opinion that this Court has jurisdiction of the appeals."

After these appeals from the Circuit Courts of Letcher, Knott, Floyd and Pike Circuit Courts had reached the Court of Appeals, by the path prescribed by statute, the Attorney-General and his associates filed in that Court a formal "motion for oral argument," in which the following appears:

> "By prosecuting this appeal, the appellant questions the constitutionality of Article III of an Act of the General Assembly of the Commonwealth of Kentucky, approved

March 15, 1906, entitled 'An Act relating to Revenue and Taxation.' Complaint is made that it not only violates the fundamental law of the State, *but also contravenes the Constitution of the United States.* * * * The matters arising on this appeal, and to be determined by the Court, are:

"1st. Has this Court jurisdiction of the appeal?

"2d. Is Article III of the Act entitled 'An Act relating to Revenue and Taxation,' approved March 15, 1906, within the legislative power as limited by the Constitution of the State of Kentucky *and the Constitution of the United States?*"

After the issues had been thus made up in writing as to the constitutionality of Article III the four appeals were advanced and heard together.

On December 20, 1907, the Court of Appeals affirmed the judgments of the four Circuit Courts in question in an opinion contained in the Record in No. 47, pp. 80–108. The following quotations from that opinion will remove all doubt, if any exists, as to the Federal questions actually passed upon by the Court of Appeals:

"These four appeals presenting a common question are heard together. They involve *the constitutionality and construction* of Article III of the revenue law passed by the General Assembly of 1906. * * * We will take up the different grounds upon which the Act is assailed. * * * First. The Act is claimed to be void, as violative of the compact with Virginia. [Then follows a learned discussion of that question of Federal law] * * * Seventh. The Act is claimed to infringe both the Federal and State constitutions in that it attempts, so it is argued for appellant, to deprive citizens of their property without due process of law. This proposition involves the power of the State to forfeit lands of the owner or claimant because he failed to list or pay taxes on them. * * * The inquiry would be in the trial; did he fail to list or pay the taxes within the time and in the manner prescribed by statute? If he did fail, then the judgment will carry into effect *the legislative fiat* that his title shall be forfeited to the State; if he did not fail, then the pro-

ceeding to forfeit will be discussed and he will be left with his title as it was before. * * * Eighth. It is assumed in argument against the validity of the Act that any retrospective statute is unconstitutional. But such is not the law. * * * There is nothing in our Constitution which prohibits retrospective taxation. Nor is there in the Federal Constitution (Florida Central R. R. Co. *v.* Reynolds, 183 U. S. 471). The only inquiry is: Has the Legislature clearly indicated its purpose to tax the property retrospectively? (Darrel *v.* Davidson, 29 Ky. L. R. 401). Under the language of this Act there can be no doubt of such a purpose. * * * All we do say is that, tested by precedent and principle, we are unable to find that it (Article III) violates any provision of the Constitution of the United States, or in any wise transcends the power of the legislative department of the State government."

Thus it appears with the greatest possible clearness, upon the face of the judgment of the Court of Appeals, that it did pass directly and adversely upon every Federal question upon which the plaintiff in error now insists. In the dissenting opinion of Judge Hobson the following appears:

"When an act is not punishable under the law in existence when it is done, it cannot be made punishable by the Legislature by a law subsequently passed. * * * The Legislature cannot deny to any one the equal protection of the laws; and in my judgment Article three of the Revenue Act of 1906 is void, both on the grround that it is *ex post facto* legislation, and that it denies the holders of land titles referred to the equal protection of the laws. * * * The forfeiture of the titles of the owners is the purpose of the Act. There could not be a clearer case of legislative intention to punish retrospectively. * * * A reading of the article shows that it was a deliberate attempt on the part of the Legislature to deny the equal protection of the laws to the owners of the land titles referred to, and to provide as to the holders of these land titles an entirely different system from that provided for the holders of other species of property. It is therefore in my judgment void both under the Constitution of this State and the Constitution of the United States."

Thus it clearly appears: (1) that the primary purpose of the four appeals contained in No. 47 was to test in the highest court of the State the constitutionality of Article III; (2) that prior to the "oral argument" the Attorney-General in formulating the issue in writing said:

> "Complaint is made that it (Article III) not only violates the fundamental law of the State, *but also contravenes the Constitution of the United States;*"

(3) that the Court of Appeals, in an opinion of 28 printed pages delivered in No. 47, passed adversely to this plaintiff on every Federal question upon which it now relies. How can there be doubt as to that fact, in view of this statement made by the Court of Appeals in its opinion in No. 48, Record, p. 146:

> "The various objections to the Act upon constitutional grounds were urged in the original appeal of Eastern Kentucky Coal Lands Corporation *v.* Commonwealth, 32 Rep., 129, and in the case of Kentucky Union Company *v.* Commonwealth decided March 25, 1908, not only upon oral argument, but also in exhaustive briefs filed on behalf of appellants upon the appeal, and again with the petition for rehearing. Because of the importance of the questions involved the time for oral argument was extended in each case, and the questions presented in argument and brief received careful consideration. In each of these cases we conclude that the Act in question violated no provision of the Constitution, either Federal or State. This conclusion is not shaken by the able re-argument on this appeal, and we approve of and adhere to the opinions in those cases. *In conformity with those opinions we hold that Article three, as construed by this Court, does not violate the provisions of the Federal Constitution denying the passage by any State of ex post facto laws, laws impairing the obligations of contracts, or laws denying to any person the equal protection of the law, or depriving any person of his property without due process of law.*"

Upon a writ of error to the highest Court of a State this Court only requires that the Federal question should have been *in fact passed upon by such highest Court.* In the recent case of

Forbes *v.* State Council (Advance Sheets, p. 296) this Court has held that it is sufficient even if—

> "such Federal question was in fact passed upon in considering the motion for rehearing."

In this case that difficulty is not involved as the Federal questions were in fact passed upon directly, and adversely to this plaintiff, *in the original opinion of the Court.* Thus the fact is settled that such Federal questions were properly before the Circuit Court of Appeals. This Court has also held in the recent case of Sylvester *v.* Washington, 215 U. S. 80, that it will review upon writ of error to a State Court its judgment as to a land title when a party insists that such judgment cannot be rendered against him consistently with the Constitution and laws of the United States, citing Anderson *v.* Caskins, 135 U. S. 483; Nutt *v.* Knut, 200 U. S. 12. The precise contention here is that the judgment of the highest Court of the State deprives this plaintiff of the title to its lands in violation of the National Constitution. This Court has settled the fact that the opinion of the Court of Appeals in No. 223 is, for all purposes, a part of the record before this Court. In Kreiger *v.* Shelby R. R. Co., 125 U. S., 39, it was held that

> "The Statutes of Kentucky require written opinions to be delivered by the Court of Appeals in all cases, and to be recorded by its clerk (Code of Civ. Proc., Sec. 765; Gen. Stat., Chap. 28, Art. 2, Sec. 10; Chap. 16, Art 1, Sec. 1). By the settled course of decision under the existing judiciary acts of the United States, this Court may examine opinions so delivered and recorded, to ascertain the ground of the judgment of the State Court."

citing many authorities. It is not at all necessary, however, to rely upon the statutes of Kentucky in this regard as it has been held in San José L. and W. Co. *v.* San José Ranch Co., 189 U. S. 177, that—

> "under the rule of this Court requiring the opinions to be sent up with the record, it has been frequently held to be a

sufficient compliance with the words 'specially set up and claimed,' that it was fully considered in the opinion of the Court and ruled against the plaintiff in error," citing

Murdock *v.* Memphis, 20 Wall., 590, and many other cases.

In Montana *ex rel.* Haire *v.* Rice, 204 U. S. 29, this Court said:

"Where it clearly and unmistakably appears *from the opinion of the State Court under review that a Federal question was assumed by the highest Court of the State to be in issue, was actually decided against the Federal claim, and the decision of the question was essential to the judgment rendered,* it is sufficient to give this Court authority to reexamine that question on writ of error.

San José Land and Water Co. *v.* San José Ranch Co., 189 U. S. 177."

See also Chambers *v.* Baltimore & Ohio R.R. Co., 207 U. S. 142.

Assignment of Errors in No. 47.

"Eastern Kentucky Coal Lands Corporation, plaintiff in error in the above entitled cause, complains of the judgment rendered therein by the Court of Appeals of Kentucky and for error therein assigns the following:

"First. The Court erred in affirming the judgments of the Pike County, Floyd County, Letcher County and Knott County Circuit Courts, the judgments of each of said Circuit Courts having been reviewed and affirmed on this appeal.

"Second. The Court erred in upholding the validity of Article III of the Act of March 15, 1906, of the Legislature of Kentucky:

"(1) Because said Article III violates the compact between Virginia and Kentucky of December 18, 1789.

"(2) Because said Article III violates the provisions of the Constitution of Kentucky and the Constitution of the United States requiring due process of law.

"(3) Because said Article III violates Section 10 of Article I of the Constitution of the United States, which declares that no State shall pass any bill of attainder or *ex post facto* law.

"(4) Because said Article III violates Section 10 of Article I of the Constitution of the United States which provides that no State shall pass any law impairing the obligation of contracts.

"(5) Because said Article III violates the Fourteenth Amendment of the Constitution of the United States which provides that no State shall deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

"Third. Because that irrespective of the invalidity of said provisions of Article III of said Act this suit by the plaintiff herein against this defendant violates the aforesaid sections, article and amendment of the Constitution of the United States because this defendant has complied with any and all (if any) of the provisions of said Revenue Act that are valid so far as the same are applicable to this defendant; if any of said provisions are valid with respect to this defendant; and this defendant has been guilty of any wrong and has not done or omitted to do any act which would forfeit this defendant's title or claim to any of said lands even if said provisions of said Article III of said Revenue Act were valid.

"Fourth. Because said Article III is an act of spoliation and lawless confiscation and is revolutionary and subversive of all constitutional and orderly government."

Thus every ruling made upon every Federal question against this plaintiff in error by the Court of Appeals has been carefully assigned as error here.

In No. 48 there is an identical assignment of errors. But in that case there is a special matter involved in the record, which has been ably presented in the main brief prepared by Messrs. Hoppin, Berard and others, pp. 63–68. It is there contended that the refusal of the Circuit Court of Pike County to permit plaintiff in error to file the amended answer in question, *setting up Federal questions* (Record, pp. 100–101), constituted a denial of the equal protection of the laws, or rather of due process of law. No possible excuses can be given for the refusal to permit the filing of the answer setting up Federal questions such as were found to exist in Western

U. Teleg. Co. *v.* Wilson, 213 U. S. 52. To what has been said on that subject in the main brief this may be added:

> "The whole subject of procedure is in the control of the Legislature and of the Courts acting in conformity with the laws. Such expressions are frequent as that, 'there is no vested right in a mode of procedure;' 'no party has a vested right to a particular remedy;' 'a right to have one's controversies determined by existing rules of evidence is not a vested right.' But every announcement so broad as these must be taken subject to limitations, and the limitation to legislative and judicial control is that the regulation of procedure must not affect fundamental rights. In a recent case the Federal Supreme Court declared that 'the State has full control over the procedure of its courts, both in civil and criminal cases, *subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific applicable provisions of the Federal Constitution.*'"
>
> McGehee, *Due Process of Law*, p. 160, citing Brown *v.* New Jersey, 175 U. S. 175; West *v.* Louisiana, 194 U. S. 263.

While there can be no doubt that the arbitrary and unprecedented refusal of the Circuit Court of Pike County to permit the filing of the amended answer in question setting up Federal questions prior to trial was a most unlawful attempt to prevent the assertion of "fundamental rights," the fact remains that such rights were fully presented otherwise, and were distinctly passed upon adversely to this plaintiff in the opinions of the Court of Appeals in both cases (Nos. 47 and 48). Therefore the constitutional questions so distinctly presented in the amended answer are as emphatically before this Court in these records as they would have been had such amended answer been filed by special leave of the Court.

No Non-Federal question broad enough to maintain the judgment.

In these cases both Federal and non-Federal questions are involved; and the attempt will no doubt be made to demonstrate that a decision has been rendered against the plaintiff

in error, upon an independent and non-Federal ground, broad enough to maintain the judgment. It is, however, beyond the power of a State Supreme Court to deprive this Court of jurisdiction, *after a Federal question has been actually passed upon*, by attempting to make it appear that the case was actually decided on an independent non-Federal ground. Unfortunately such attempts have become so common upon the part of State Supreme Courts that this Court has been compelled to formulate very stringent rules designed to prevent their consummation. In Terre Haute, etc., R. Co. *v.* Indiana, 194 U. S. 579, this Court held that it will—

> "review a decision of a State Court sustaining the enforcement against a railway company of an alleged charter obligation to pay over the surplus profits to the State, which could not have been reached except by erroneously construing the charter, without relying on subsequent legislation flagrantly repugnant to the Federal Constitution and challenged for that reason, *where the State Court clearly did rely upon that legislation to some extent, although it put forward in its judgment the untenable construction more than the unconstitutional statutes.*"
>
> (Co-op. H. N.)

In Schlemmer *v.* Buffalo R. & P. R. Co., 205 U. S. 1, this Court said:

> "And if it is evident that a ruling purporting to deal only with local law has for its premise or necessary concomitant of cognizable mistake, that may be sufficient to warrant a review."
>
> Terre Haute & I. R. Co. *v.* Indiana, 194 U. S. 579.

In Attorney-General *v.* Lowrey, 199, 233, it was held that this Court—

> "is not without jurisdiction to review, by writ of error, a decision of a State Court sustaining a State statute claimed to impair contract obligations, *because the State Court rests its conclusion of the non-existence of the contract upon a construction of the State Constitution and laws.*"
>
> (Co-op. H. N.)

In Chicago, B. & Q. R. Co. *v.* Illinois, 200 U. S. 561, 580, this Court said with great emphasis that it—

> "will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up and claimed, *and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law.*"

Again, when in West Chicago Street R. Co. *v.* Illinois, 201 U. S. 506, an attempt was made to defeat the jurisdiction of this Court by resting the judgment ostensibly on grounds of local or general law this Court said:

> "If that position be well taken, then a judgment based merely upon grounds of local or general law would be error; *for the Federal questions raised cover the whole case, and are of such a nature that the rights of the parties could not be finally determined without deciding them. As the judgment, by its necessary operation, denied the company's claims based on the Constitution of the United States, this Court has jurisdiction to inquire whether those claims are sustained by that instrument.*"
>
> See also Western Turf Assoc. *v.* Greenberg, 204 U. S. 359.

That is an ideal description of conditions as they exist in these records in which

> "the Federal questions raised cover the whole case, and are of such a nature that the rights of the parties could not be finally determined without deciding them."

And yet, notwithstanding that fact, the State Court after devoting the gravamen of its opinion to a decision adverse to this plaintiff on such Federal questions, attempted at the close to deprive this Court of the jurisdiction to review that decision by pretending to rest its judgment upon an extreme and whimsical construction of the local law of procedure. The State Supreme Court evidently anticipated such a criticism when it was careful to say in advance:

> *"Nor are these objections merely technical, interposed whimsically so as to defeat the proposed listing of the land, and so as to work a forfeiture."*
> (Record, 223, p. 107.)

When such technical and whimsical rules of procedure are thus employed for the purpose of defeating a Federal right, they themselves become obnoxious to the rule laid down by this Court in Brown *v.* New Jersey, 175 U. S. 175, wherein it was said that a State's right to control its procedure in civil and criminal cases is subject to—

> "the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.
> *Ex parte* Reggel, 114 U. S. 642; Iowa C. R. Co. *v.* Iowa, 160 U. S. 389; Chicago, B. & Q. R. Co. *v.* Chicago, 166 U. S. 226."

The attempt made by the Court of Appeals in these records to obscure the fact that—

> "The Federal questions raised cover the whole case, and are of such a nature that the rights of the parties could not be finally determined without deciding them"—

is too transparent to be dangerous. In Vandalia R. Co. *v.* Indiana, 207 U. S. 359, this Court, after holding that it—

> "is not concluded by the ruling of the State Court, and must determine for itself whether there is really involved any Federal question which will entitle it to review the judgment,"

declared that—

> "A case may arise in which it is apparent that a Federal question is sought to be avoided or is avoided by giving an unreasonable construction to the pleadings."

After actually deciding the Federal questions, constituting the very essence of the case, adversely to this plaintiff, the

Court of Appeals deliberately attempted to defeat the jurisdiction of this Court to review its judgment on such Federal questions by pretending to rest such judgment upon the ground that this plaintiff in the averments of its careful and elaborate petitions did not "comply with the statute, so that the County Court ought to have listed the lands." The emptiness of that pretense is fully exposed in the main brief, pages 26–60. The fact that this plaintiff *was denied the right to amend its petitions*, after the supposed defects in them had been pointed out by the Court of Appeals, should leave no doubt in the mind of this Court that the purpose of that Court was, "by an unreasonable construction of the pleadings," (1) to "work a denial of fundamental rights," (2) to defeat the right of this Court to review its judgment. The majority opinion opens with this statement:

> "These four appeals presenting a common question are heard together. They involve *the constitutionality and construction* of Article II of the revenue law passed by the General Assembly of 1906."

The dissenting opinion of Judge Hobson closes with this statement:

> "A reading of the Article [III] shows that it was a deliberate attempt on the part of the Legislature to deny the equal protection of the laws to the owners of the land titles referred to, and to provide as to the holders of these land titles an entirely different system from that provided for the holders of other species of property. It is therefore in my judgment void both under the Constitution of this State and the Constitution of the United States. For these reasons I dissent from the opinion of the Court."

In the majority opinion this statement is made:

> "The constitutionality of the Act is questioned by appellant. The question must be decided, as, if it is unconstitutional, appellant would have the right to list its lands under other provisions of law relating to the

assessment of omitted property. If it is constitutional, then unless appellant has complied with its terms, the action of the lower Court was right."

Thus it is too clear for doubt that this Court has jurisdiction to review every Federal question which the assignment of errors presents.

III.

Unconstitutional Construction and Enforcement of a State Law.

In Twining *v.* New Jersey, 211 U. S. 90, this Court said:

> "The judicial act of the highest Court of the State, in *authoritatively construing and enforcing* its laws, is the act of the State.
>
> *Ex parte* Virginia, 100 U. S., 339; Scott *v.* McNeal, 154 U. S., 34; Chicago, B. and Q. R. Co. *v.* Chicago, 166 U. S., 226."

In Scott *v.* Neal it was said:

> "Upon a wit of error to review the judgment of the highest Court of a State upon the ground that the judgment was against a right claimed under the Constitution of the United States, this Court is no more bound by *that Court's construction of a statute of the territory or of the State* when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which had been impaired by a subsequent law."

It is thus firmly settled here that when the highest Court of a State authoritatively *construes and enforces* a State law in such a manner as to take away a Federal right or immunity this Court may strike down *such construction so as to preserve such right or immunity without putting the stamp of nullity upon the State law in any other particular.* To employ again language used in Twining *v.* New Jersey:

> "We have no authority to go farther and determine whether the State Court has erred in the interpretation and enforcement of its own laws."

In maintaining that this plaintiff has been deprived of his rights guaranteed by Section I of the Fourteenth Amendment it is not necessary for us to go farther than to assail *the construction put* upon Article III, as a part of the tax system and so enforced by the judicial act of the highest Court of the State as to take away such rights. It is perfectly clear that this Court may annul such *construction and enforcement* of the system contained in Article III, leaving it otherwise intact so far as the Fourteenth Amendment is concerned. As this argument will be here limited to the questions arising under the due process of law and equal protection of the law clauses of that amendment, the attack will be limited to that construction of Article III, through whose enforcement, by the judicial act of the highest Court of the State, the Federal rights so guaranteed have been taken away. In King *v.* Mullins, 171 U. S. 422, this Court said that it hesitated to strike down a certain part of the Constitution of West Virginia because such a course—

> "might greatly disturb the land titles of two States under a system which has long been upheld and enforced by their respective legislatures and courts."

That reference to the long-standing land systems existing in Virginia and West Virginia can have no possible application here, because the Court of Appeals admits, and the Attorney-General of Kentucky admits, that the system embodied in Article III did not originate until 1906. In the words of the latter—

> "Article III of said chapter is in conflict with this general system from beginning to end. It is sandwiched between the general provisions of the law *and is entirely new.*"

No provision of the Constitution of Kentucky is assailed. In this argument the Court is only asked to strike down a certain construction put upon Article III whose enforcement by the highest Court of the State has deprived this plaintiff of his rights guaranteed by the Fourteenth Amendment. If this argument prevails no part of the Constitution of Kentucky will be disturbed; no long-standing system of land titles will be disturbed; the new system created by Article III in 1906 will only be affected by subtracting from it that unconstitutional construction which now permits the confiscation of private property, *for the purpose of settling land titles*, without due process of law, and in defiance of the guarantee of the equal protection of the law. What is said herein cannot conflict in any way with other and wider contentions contained in the main briefs.

IV.

Plaintiff in Error has been Deprived of the Due Process of Law Guaranteed by the Fourteenth Amendment.

From what source is the power of a State of this Union to work a forfeiture or outlawry by "legislative fiat," *as a means of settling land titles*, derived? When the tie of political dependence that bound the colonies to the mother country was severed, the English provinces in America rose to the full stature of sovereign states. As this Court has expressed it:

> "When the Revolution took place the people of each State became themselves sovereign,"

and as soon as they—

> "took into their own hands the powers of sovereignty, *the prerogatives and regalities which before belonged either to the crown or the Parliament became immediately and rightfully vested in the State.*"
>
> Taney, C. J., in Martin *v.* Lessee of Waddell, 16 Pet., 410.

No American jurist has ever claimed that any State legislature is endowed with a sovereignty more comprehensive than that thus defined by the phrase—"the prerogatives and regalities which before belonged either to the crown or the Parliament became immediately and rightfully vested in the State." No one who knows anything of the history of English law will for a moment contend that the State power in question to work a forfeiture or outlawry as a means of settling land titles or as a means of collecting taxes was ever exercised, *either by the Crown or Parliament.* In Martin *v.* Snowden, 18 Gratt. 100, the Court of Appeals of Virginia made an exhaustive inquiry into the entire subject; and, after referring to the case of Murray *v.* Hoboken L. and I. Co., 18 How., 272, it thus stated its conclusions:

> "Can a forfeiture of the land charged with taxes, such as is contended for in these cases, be regarded as 'due process of law,' upon the principles established by that case? Literally speaking, it is not any process at all, but operates by force of law, and without any process or proceeding whatever, except the ascertainment by the commissioners of the sum chargeable on the land. But that is probably immaterial. The forfeiture of land to the Crown does not appear to have been a means recognized and employed in England, at any period in its history, for enforcing the payment of taxes or other debts to the Crown. If it had been we should have found such forfeitures treated of in the English law books; but we nowhere find them mentioned. * * * The mode of collecting the land tax in England was by distress. * * * A statute of Virginia, said to have been passed in 1785, has been cited to us as an instance in which a State, before the adoption of the Constitution, declared lands to be forfeited absolutely for the non-payment of taxes. This is the only instance of the sort that has been cited to us. But, this statute was really not passed in 1785, but in 1790, when this sort of forfeiture was for the first time introduced in Virginia. * * * As I have already intimated this class of forfeitures has not been employed in Virginia as one of the usual means of enforcing the payment of taxes, *but rather for the purpose of*

establishing land titles and settling vacant and abandoned lands. * * * It appears from this recital of the provisions of the Act of 1790, that the forfeiture was not resorted to on one of the known and accustomed means of collecting a tax. It was resorted to as *a new proceeding*, when other means failed—when no effects could be found in the county or in any other county to satisfy the tax; and when, after advertisement, and a delay of three years, no person would pay it. It could hardly apply to any case in which the land had not been abandoned by the owner. *There is nothing, therefore, in the usages and modes of proceeding which prevailed in England or in this country before, or at the time of the adoption of the Constitution*, which authorizes me to say according to the principles of Murray's lessee *v.* Hoboken Company that a peremptory and absolute forfeiture of title at the end of sixty days, as contended for in these cases, is 'due process of law,' for the collection of taxes due the United States."

In affirming the case in question this Court said in Bennett *v.* Hunter, 9 Wall. 326:

"Without pausing to inquire whether, in any case, the title of a citizen to this land can be divested by forfeiture and vested absolutely in the United States, without any inquisition of record or some public transaction equivalent to office found, *it is certainly proper to assume that an Act of sovereignty so highly penal is not to be inferred from language capable of any milder construction* (Fairfax's Devisee *v.* Hunter's Lessee, 7 Cranch, 625). In the case of lands forfeited by alienage the King could not acquire an interest in the lands except by inquest of office (3 Bl. Com., 258). And so of other instances where the title of the sovereign was derived from forfeiture."

Thus it has been firmly established by the Court of Appeals of Virginia, in a case affirmed by this Court: (1) that—

"The forfeiture of land to the Crown does not appear to have been a means recognized in England at any period in its history for the enforcing the payment of taxes or other debts of the Crown;"

(2) that nothing—

> "in the usages and modes of proceeding which prevailed in England, *or in this country before, or at the time of the adoption of the Constitution*"

authorizes the idea that any State ever possessed the power to forfeit land as a means for the enforcing the payment of taxes thereon; (3) that in Virginia only one instance can be found of an attempt to exercise such a power:

> "that this class of forfeitures has not been employed in Virginia as one of the usual means of enforcing the payment of taxes;"

that it was there resorted to "*as a new proceeding*" in very exceptional cases: "it could hardly apply to any case in which the land has not been abandoned by the owner." In the light of such constitutional history it is certain that no State of this Union possesses or has ever possessed sovereign power to forfeit land *as a means for enforcing the payment of taxes thereon*. If that be true, then it is doubly certain that no State possesses the power to forfeit land, *as a means for outlawing titles or settling controversies as to the same*. This basic contention, which goes to the very root of this controversy, this Court has never attempted to answer save by silence. Every student of the Constitution has the right to ask *from what source a State of the Union derives the power to forfeit land as a means for outlawing titles or settling controversies as to the same*. Certainly no such power can be derived either from the Constitutional or common law of England, and no such power existed or was asserted "in this country before or at the time of the adoption of the Constitution." *Not until a year after that event did the first and absolutely isolated attempt to assert such a power occur in Virginia*. Certainly Kentucky never inherited such a power from Virginia for the conclusive reason that the mother State, as declared by her highest Court, never possessed it herself, nor does she now attempt to exercise it. "An Act of sovereignty so highly penal," as this Court has described this

power of forfeiture, must certainly be derived from some definite and historic source. I humbly petition this Court to declare from what source it is derived? By what process of reasoning can it be demonstrated that a State of this Union has vested in its legislature the power to perform "an Act of sovereignty so highly penal" as that involved in the forfeiture of land for the purpose of settling controversies as to the title thereto, a function that belongs to the courts alone. So far this Court has shed no light on that problem of problems which lies at the base of our State system whose substructure is purely English. Leaving Virginia and Kentucky out of view, West Virginia is really the only State in this Union which has "*declared an absolute forfeiture to be valid and constitutional*" McGehee, *Due Process of Law*, p. 234). What more conclusive proof could be given of the fact that it has never been claimed in this country that a State possesses the power of forfeiture as a means for enforcing the collection of taxes, or as a means of settling conflicts as to land titles. Why should the national conception of due process of law be changed to meet the whim or the interest of a single community?

If, however, this Court in its wisdom shall see fit to assume that each State possesses the sovereign power in question, no matter what the source from which it may have been derived, then we earnestly insist that it should keep ever in view its declaration made in Bennett *v.* Hunter that—

> "it is certainly proper to assume that an act of sovereignty so highly penal is not to be inferred from language capable of any milder construction."

If, in reviewing the construction put upon Article III by the highest Court of Kentucky, whereby the property of this plaintiff has been forfeited and swept away by "an act of sovereignty so highly penal"—this Court should perceive that by a different construction, such a forfeiture might have been prevented, then the harsher construction, which works the forfeiture through a denial of due process of law, should be rejected.

In Munn. *v.* Illinois, 94 U. S., 113, this Court, speaking through Waite, C. J., said:

> "When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance of their government. *They retained for the purposes of government all the powers of the British Parliament* and, through their State Constitutions or other forms of social compact, undertook to give practical effect to such as they deemed necessary *for the common good and the security of life and property.* * * * This grant operated as a further limitation upon the powers of the States, *so that now the governments of the States possess all the powers of the Parliament of England*, except such as have been delegated to the United States or reserved to the people."

In Davidson *v.* New Orleans, 96 U. S., 97, this Court said:

> "It is easy to see that when the great Barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the Crown, except as provided by the law of the land, they meant by 'law of the land' *the ancient and customary laws of the English people* enacted by the Parliament of which those Barons were the controlling element."

Thus it has ever been axiomatic here that our entire State system rests upon English law, and that the sovereignty of the States is so limited and fettered by that law that no sovereign act that attempts to affect "the security of life and property," can be in accordance with "the law of the land," or its equivalent "due process of law," if it finds no sanction in the history of English law as it existed in the mother country and in the colonies, prior to the adoption of our Federal Constitution.

In the light of that axiom of our constitutional law, the primary purpose of this brief will be to propound to this Court two entirely distinct questions. First, has any State of this Union the sovereign power to forfeit land, or outlaw the

title thereto, by legislative fiat, *as a means of settling controversies as to the title thereto*? Second, has any State of this Union the sovereign power to forfeit land, or outlaw the title thereto, by legislative fiat, *as a means of collecting the taxes thereon*? It is impossible to confuse these entirely distinct propositions which will be discussed separately.

As demonstrated heretofore the primary purpose of Article III, which the Attorney General of Kentucky admits is an "entirely new" creation "sandwiched between the general provisions" of the Revenue Law of 1906, was, as declared by the Court of Appeals, "*to outlaw these dormant titles*" whose history that Court has taken great pains to set forth. In the words of that Court:

> "The idea was not new to the legislature that the duty of the Commonwealth was to protect herself from the continuation of that thrall that was paralyzing its peace, and robbing the State treasury of its revenues. Thereupon Article 3 of the Act of 1906 was most deliberately adopted. There can be no doubt *that the legislature determined to outlaw these dormant titles*, and thereby protect the treasury and increase the State's revenues."

Thus with all possible clearness of language the declaration is made that the *primary purpose* of the outlawing or confiscation was the settlement of controversies as to land titles; the *secondary or subsidiary* object an increase in the revenue. In the language of the same Court:

> "If he (the owner) did fail (to list or pay the taxes), then the judgment will carry into effect *the legislative fiat* that his title shall be forfeited to the State."

Therefore the precise question is this: Can any act of a State legislature which has for its primary purpose the forfeiture or outlawry of land titles by "legislature fiat," as a means of settling controversies as to such title, exist in the presence of the due process of law clause of the Fourteenth Amendment? In

McCulloch *v.* Maryland, 4 Wheat., 316, this Court laid down this canon of construction:

> "*Let the end be legitimate*, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

It is equally true that "*let the end be illegitimate*," no means which may be employed to work out that illegitimate end can impart to it legality! In this matter the *illegitimate end* is the attempt to settle controversies as to land titles by the exercise of the power of confiscation or or outlawry, a power which no American State ever inherited from the English law system for the simple and conclusive reason that it never existed, in any form, in that system. The Court of Appeals of Virginia has declared that no State of this Union ever attempted to exercise such a power prior to the adoption of the Federal Constitution of 1789; that but one isolated attempt occurs in the history of Virginia and that was in 1790. The judgments of this Court heretofore cited demonstrate that no State can exercise state powers, in the name of "the law of the land" or "due process of law" unless they can be derived from the principles of the law of England which is the substructure of the entire system.

As a practical illustration of that construction reference will be made to the *droit administratif* of France which a French authority has defined to be "the body of rules which regulate the relations of the administration or of the administrative authority toward private citizens" (Aucoc, *Droit Administratif, i. s.* 6). Mr. Dicey (The Law of the Constitution, p. 316) tells us that it is by virtue of that system of distinctively French law that "A policeman acting under the orders of his superiors breaks into a monastery, seizes the property of the inmates and expels them from the house," without any liability to suit in the ordinary tribunals under what we would call the law of the land. As such a policeman acts under an

administrative order he is only liable to be tried "by administrative courts, at the head of which stands the Council of State." Mr. Dicey, who fills the chair of Blackstone at Oxford, says further that—

> "In England, and in countries which, like the United States, derive their civilization from English sources, the system of administrative law and the very principles on which it rests are unknown. This absence from the institutions of the Union of anything answering to *droit administratif* arrested the observation of Tocqueville from the first moment when he began his investigations into the character of American democracy."
>
> Oeuvres Complètes, vii, p. 66.

Now let us suppose that the State of Louisiana, in which French legal ideas have taken deep root, should venture to enact the *droit administratif* system, and that under it an attempt should be made by the executive power, proceeding through administrative officers, to break into a convent in the city of New Orleans, seize the property of the inmates, expel them from the house, without accountability for the trespass and assault under the law of the land. If such an attempt should occur the stamp of illegality could only be put upon it here, under our Federal Constitution, because the State of Louisiana has no inherent power to engraft upon her State system this French exotic which is so obnoxious to the principles of English law that Mr. Dicey says:

> "The term *droit administratif* is one for which English legal phraseology supplies no proper equivalent."

Precisely in the same way and to the same extent the mind of the American jurist should be shocked by the monstrous contention that a State of this Union may incorporate into its State system the power to settle controversies as to land titles by a process of confiscation or outlawry which is just as foreign to English ideas of due process of law as *droit administratif* possibly can be.

In defining the law of the land, as English and American jurists understand it, Lieber, in his *Civil Liberty and Self-Government*, p. 91, has said:

> "The guarantee of the supremacy of the law leads to a principle which, so far as I know, it has never been attempted to transplant from the soil inhabited by Anglican people, and which, nevertheless, has been, in our system of liberty, the natural production of a thorough government of law as contra-distinguished to a government of functionaries."

The administrative law of France (*droit administratif*) represents the diametrically opposite idea of a government of functionaries who can divest vested interests, despoil a man of his property, and deprive him of his liberty, in violation of the law of the land, without accountability to the ordinary tribunals. The attempt now being made in certain States of this Union to accomplish just what the Supreme Court of Kentucky says can be constitutionally accomplished by an act of a State legislature is a most conspicuous illustration of the idea that there may be in this country such a thing as a government of functionaries who may destroy property rights without regard to the forms of procedure marked out by the law of the land. Unless this Court tramples upon that heresy as embodied in the State legislation now before it, then due process of law, according to English ideas, must give way to the French notion of government by functionaries armed, *in particular cases*, with the power to set aside "the law of the land." Legislative functionaries have no more power than executive functionaries to perform an act in its essence purely judicial, contrary to the forms which "the law of the land prescribes.

There can be no justification for the contention that this Court has no jurisdiction to determine whether or no the transfer of property under the authority of a State, pretending to exercise this confiscatory power by "legislative fiat," is not an open violation of the Fourteenth Amendment. That

concrete question is sharply presented by these records, and, as it is basic and far-reaching, should be answered one way or the other? In Cohens *v.* Virginia, 6 Wheat., 264, Marshall C. J., said:

> "We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur we would gladly avoid; but we cannot avoid them."

The primary and earnest purpose of this brief is to press upon this Court, with all possible respect, that it cannot avoid the duty which demands in these cases the exercise of the jurisdiction specifically imposed upon it by the Fourteenth Amendment to determine whether or no any State in this Union possesses, consistently with that amendment, the right to confiscate land or outlaw the title thereto, *as a means of settling controversies as to the title thereof.* If such a power ever existed or does now exist in any State, certainly it can be traced to the source from which it comes. If such a power never existed and does not now exist certainly that fact, decisive of one branch of this controversy, should not be put aside or avoided.

Even if the first contention is denied, the second remains: Has any State of this Union the sovereign power to forfeit land, or outlaw the title thereto, by legislative fiat, *as a means of collecting taxes thereon?* No mathematical demonstration was ever more exact or complete than the historical demonstration through which the Court of Appeals of Virginia in Martin *v.* Snowden, 18 Gratt., 100 (affirmed here as Bennett *v.* Hunter, 9 Wall., 336) has settled the fact that no State has derived from English law the right to forfeit land or to outlaw the title thereto, by legislative fiat, as a means of collecting the taxes thereon. With equal emphasis this Court has always maintained that due process means—

> "that there can be no proceeding against life, liberty or

property which may result in the deprivation of either, without the observance of those general rules *established in our system of jurisprudence for the security of private rights.*"

Hager *v.* Reclamation Dist., 111 U. S., 701.

And in Davidson *v.* New Orleans, 96 U. S., 97, it was declared that such private rights cannot be divested except "by the 'law of the land,' *the ancient and customary laws of the English people.*" If the process by which private rights are divested is not a process known to English law it cannot be "due process." That fact this Court emphasized with all possible force in Murry's lessee *v.* Hoboken Land Co., 18 How., 272, in which a peculiar process was upheld as due process simply because it was English. And yet despite the basic and axomatic truth that property cannot be divested or transferred by "due process," unless such process conforms to those "general rules established in our system of jurisprudence for the security of private right"— such general rules being derived from "the ancient and customary laws of the English people"—certain States have usurped the power to collect taxes by means of forfeitures or confiscations in open defiance of the English principles upon which "due process" or "the law of the land" depends. If the States in question had seen fit to incorporate into their laws the *droit administratif* of France, heretofore described, the usurpation of State-power could not have been more pronounced. But, *prior to the Fourteenth Amendment*, there was no constitutional check upon the States, so far as this Court is concerned, whenever they saw fit to impair property rights by such devices. The most graphic statement of the situation, prior to the Fourteenth Amendment is contained in the judgment of Mr. Justice Field in Santa Clara Co. *v.* S. R. R. Co., 18 Fed. R., 385. In the course of his argument in the San Mateo County case Mr. Conking emphasized the fact that one of the motives that seriously influenced the Reconstruction Committee in framing the Fourteenth Amendment was an appeal

"of an express company, whose stock was owned largely

by citizens of the State of New York, who came with petitions and bills seeking acts of Congress to aid them *in resisting what they deemed oppressive taxation in two States* and ruinous rules of damages applied under State laws."

Guthrie, *The Fourteenth Amendment*, p. 25.

This Court has been careful to recognize from the outset that the amendment in question applies whenever there is an abuse of law amounting to confiscation of property or a deprivation of personal rights, such as existed in Norwood *v.* Baker, 172 U. S., 269. But the precise question was more exactly met in Bell's Gap. R. Co. *v.* Pennsylvania, 134 U. S., 232, when this Court, after declaring that a State legislation, in the matter of taxation, may impose—

"All such regulations, and those of like character, *so long as they proceed within reasonable limits and general usage*, cannot make *hostile discriminations against particular persons and classes, especially such as are of an unusual character*, UNKNOWN TO THE PRACTICE OF OUR GOVERNMENT."

Into that last phrase, "unknown to the practice of our Government," is condensed the essence of the whole matter. No State can, without violating the due process of law clause of the Fourteenth Amendment, incorporate into its tax system a scheme of forfeiture or confiscation, by legislative fiat, which has no basis in English law as reproduced in this country.

For some years a most persistent and menacing effort has been made to induce this Court to repudiate its own decisions in which it has so sternly refused to recognize the legality of forfeitures as a means of collecting taxes, in order that it may substitute in their stead the decisions of a very few States in which such forfeitures have been recognized as legal, in defiance of the basic principles of English law defining due process. In the case of Bennett *v.* Hunter, 9 Wall., 326, this Court affirmed, without qualification, the case of Martin *v.* Snowden,

18 Gratt., 100, in which the Court of Appeals of Virginia annihilated the contention that any State of this Union ever derived from the law of England any right to forfeit lands, as a means of collecting taxes. Speaking through Mr. Chief Justice Chace this Court then said:

> "And we are first to consider whether the first clause of this section, *propio vigore*, worked a transfer to the United States of the land declared to be forfeited. * * * Now, the general principles of the law of forfeiture seem to be inconsistent with such a transfer. Without pausing to inquire whether, in any case, the title of a citizen to his land can be divested by forfeiture and vested absolutely in the United States, without any inquisition of record or some public transaction equivalent to office found, it is certainly proper to assume that an act of sovereignty so highly penal is not to be inferred from language capable of any milder construction (Fairfax's Devise *v.* Hunter's Lessee, 7 Cranch, 625). In the case of lands forfeited by alienage the King could not acquire an interest in the lands except by inquest of office, 3 Bl. Com., 258. And so of other instances where the title of the sovereign was derived from forfeiture."

Thus this Court frankly recognized that no forfeiture can take place in this country for any purpose, as a means of transferring the title to property unless it be attended with all the formalities and safeguards put about it by the customary law of England. In Bennett *v.* Hunter the precise question was—

> "whether the commissioners under the Act could make a sale for taxes, notwithstanding a previous tender of the amount due."

The conclusion was that no man's land can be forfeited and sold, after a previous tender of the amount due. Twelve years later the case of Bennett *v.* Hunter was, after a searching review, affirmed by the judgment rendered in United States *v.* Lee, 106 U. S., 196, one of the most famous and far-reaching ever rendered by this Court. In that case a citizen of Virginia

had been deprived of the Arlington estate under a tax proceeding which he claimed to be illegal, because of an attempt upon the part of the United States to confiscate and appropriate his land under a pretended tax sale, after an offer upon the part of the owner to pay the tax prior to the sale. The landowner sought redress under the due process of law clause of the Fifth Amendment, and the vital issue in the case is thus stated by Mr. Justice Miller in the head note prepared by himself:

> "The constitutional provisions that no person shall be deprived of life, liberty or property without due process of law, nor private property taken for public use without just compensation, are intended as limitations upon the power of the Government in its dealings with the citizen, and relate to that class of rights whose protection is peculiarly within the province of the judicial branch of the Government."

Proceeding upon that basis the Court held—

> "*That the commissioners, having in the execution of the law acted upon a rule which deprived the owner of the land of an important right; a right which went to the root of the matter;* a right which has, in no instance known to us or cited by counsel, been refused to a taxpayer, the sale made under such circumstances is invalid, as much so as if the tax had been actually paid or tendered. The proposition is thus expressed by this Court at its last Term, in the case of Hills *v.* Bank, as the result of the cases above cited: 'It is a general rule that when the tender or performance of an act is necessary to the establishment of any right against another party, the tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused.'"

Thus it appears that after a careful review of the cases of Bennett *v.* Hunter, 9 Wall., 326; Tracey *v.* Irwin, 18 Wall., 549; Atwood *v.* Weems, 99 U. S., 183; Hills *v.* Bank, 105 U. S., 319, this Court deliberately determined in the great case of United States *v.* Lee, which has never been questioned,

THAT UNDER THE DUE PROCESS OF LAW CLAUSE OF THE FIFTH AMENDMENT NO LANDOWNER CAN BE DEPRIVED OF HIS LAND UNDER A TAX PROCEEDING, EITHER BY SALE OR FORFEITURE, WHEN IT IS MADE TO APPEAR THAT SUCH LANDOWNER STOOD READY TO PAY THE TAX PRIOR TO THE PROCEEDING BY WHICH HIS TITLE WAS DIVESTED.

In reaching that conclusion this Court was careful to declare that no actual or technical tender is necessary. In the Lee case the statement made in Hills *v.* Bank was repeated:

> "This tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused."

Thus this Court has defined so clearly that he who runs may read what must constitute due process of law under the Fifth Amendment, when an attempt is made to divest a landowner of his estate in land under a tax proceeding in which such landowner stands ready to pay the tax prior to the divestiture. Can this Court when it is called upon to define the due process of law clause of the Fourteenth Amendment repudiate the definition which it has given to that clause in the Fifth Amendment? That is not an open question here. It has long been settled that the Fourteenth Amendment operates to extend to the citizens and residents of the States the same protection against arbitrary State legislation affecting life, liberty and property as is affronted by the Fifth Amendment against similar legislation by Congress. In *Ex parte* Kemmler, 136 U. S., 436, this Court said:

> "As due process of law in the Fifth Amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States exercised within the limits therein prescribed, and interpreted according to the principles of the common law, so, in the Fourteenth Amendment, the same words refer to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the

limits of those fundamental principles of liberty and justice which lie at the base of our civil and political institutions."

In French *v.* Barber Asphalt Paving Co., 181 U. S., 324, this Court proceeded "on the assumption that the legal import of the phrase, 'due process of law,' is the same in both amendments." (See McGehee, Due Process of Law, p. 35.) Under the due process of law clause of the Fourteenth Amendment, as this Court has defined it, this plaintiff in error is entitled to protection against the construction put by the highest Court of Kentucky upon its tax system whereby plaintiff's property has been confiscated by legislative fiat under an avowed process of outlawry, while it was doing all in its power to tender and pay the tax on the land so confiscated.

In the larger brief (pp. 26–37) the facts are set forth in detail as to the efforts of plaintiff in error to comply with with Article III by listing its lands and paying the tax. It filed its petition to list in Floyd and Pike Counties on December 27, 1906, in Knott County on December 29, 1906, in Letcher County on December 31, 1906. On the hearings of the petitions to list in the County Courts or Circuit Courts, counsel for plaintiff in error produced and offered to read in evidence the assessor's books and moved the Court to assess the total of acres listed by the plaintiff in error for assessment, viz: in Letcher County, 55,020 acres at $1.00 per acre (Case No. 223, fols. 31 and 34); in Floyd County, 88,415 acres at $1.00 per acre (Id., fol. 65), in Knott County, 20,058¾ acres at $1.00 per acre (Id., fol. 59). In Pike County, pending the hearing on the motion to dismiss the petition to list, plaintiff in error in Pike Circuit Court offered to list 275,236 acres claimed by it in Pike County and described in its petition "*at the rate of one dollar per acre and to pay the taxes thereon assessed at said rate.*" (Id., fols. 114–115.) It thus appears that the aggregate upon which the plaintiff in error thus offered to pay taxes was nearly 440,000 acres in the four counties, and the total amount of taxes thus tendered by it was nearly $44,000,

which sum was more than the total annual income of the all four of these counties taken together, including therein the taxes paid by the adversaries of plaintiff in error who claimed 200,000 *acres of mineral rights underlying the surface for which they were seeking to forfeit and acquire the title of plaintiff in error* (Record No. 223, fols. 245-246). Despite these deliberate and legal efforts to comply with the requirements of Article III, the highest Court of Kentucky so construed the tax system of that State as to take away from the plaintiff in error its constitutional right to pay the taxes charged upon its lands, and thereafter forfeited the same upon the pretence that it had not performed those acts which the courts of Kentucky deliberately and designedly denied it the right to perform. The design thus to defeat the right of plaintiff in error originated in the primary courts and was executed therein according to a prearranged form. As an illustration reference may be made to the judgment rendered by the Knott Circuit Court, March 18, 1907, in the following form:

> "The Court sustains the demurrer to the petition and application for the reason that in the opinion of the Court the said petition and application is insufficient in that it does not comply with the mandatory provisions of said articles and for other good and sufficient reasons apparent on the face of the petition and application. It is further ordered and adjudged that the motion to dismiss the petition and application, be and the same is now sustained, and that the petition and application be and the same is now dismissed."
>
> Record in No. 223, pp. 22-23.

The same device, by which perfectly adequate petitions were arbitrarily dismissed, *without the right to amend*, was repeated, in the same form, in the judgment rendered by the Floyd Circuit Court, March 12, 1907, Record, p. 50; and in that rendered by the Pike Circuit Court, December 27, 1907, Record, p. 69. In the Court of Appeals the design to cut off the right of the plaintiff in error to list its lands and to pay the tax on the same, thus begun in the primary courts, was

consummated by that part of the judgment in which it was declared that —

> "we conclude that the County Courts were right in refusing the lists, and the Circuit Courts' judgments so holding are each affirmed."
>
> Record, p. 108.

Here the right to list and pay taxes upon perfectly adequate petitions was arbitrary cut off by the unconstitutional judgment of the highest Court of the State, *which withheld the right to amend such petitions.* The more conclusive proof that the final judgment of such highest court was a technical device "interposed whimsically so as to defeat the proposed listing of the land, and so as to work its forfeiture," is to be found in its own conscience-stricken outcry:

> "Nor are those objections merely technical, interposed whimsically so as to defeat the proposed listing of the land, and so as to work its forfeiture."

When this Court traces the deliberate design to defeat the right of plaintiff in error to list its lands and pay the taxes thereon, from its reception in the primary courts up to and through its consummation in the highest State Court, it cannot fail to see that it was purely a technical device or trick "interposed whimsically so as to defeat the proposed listing of the land, and so as to work its forfeiture."

Anticipating just such attempts as this to defeat fundamental rights through devices veiled under the claim of a State's "full control" over the procedure in its courts, this Court was careful to declare in Brown *v.* New Jersey, 175 U. S., 175, that such "full control" is subject —

> "to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution."
>
> *Ex parte* Reggel, 114 U. S., 642;
> Iowa C. R. Co. *v.* Iowa, 160 U. S., 389;
> Chicago, B. & Q. R. Co. *v.* Chicago, 166 U. S., 226.

That statement was repeated and confirmed in West *v.* Louisiana, 194 U. S., 263. In the case of Chicago, B. & Q. R. Co. *v.* Chicago this Court demonstrated that the doctrine in question is no barren theory, no mere optical delusion, when it held that—

> "a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the titles of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. *In determining what is due process of law, regard must be had to substance, not to form.* This Court, referring to the Fourteenth Amendment, has said: 'Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition of the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation.' (Davidson *v.* New Orleans, 96 U. S., 97, 102.) The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then the final judgment of a State court, under the authority of which the property is in fact taken, is to be deemed the act of the State within the meaning of the Amendment."

Therefore this Court held in that case that—

> "a judgment of a State court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a

> denial by that State of a right secured to the owner by that instrument."

Thus this Court, *after spurning mere forms in order to deal with substance*, held—

> "that 'due process' is not always satisfied *by the mere form of the proceeding*, the fact of notice, and a right to be heard."

If this Court will only apply those principles to this case, passing beyond the mere devices of form to the matter of substance actually accomplished by the final judgment of the highest court of the State, it cannot fail to perceive that the fundamental constitutional right of the plaintiff in error to save its lands from forfeiture or confiscation by listing the same and paying taxes thereon was deliberately and wantonly taken away by a mere trick or device of procedure. This plaintiff came into Court as the statute provided with formal and adequate petitions properly drawn by learned and experienced counsel (one of them an ex-Attorney General of the State), and begged the right to list its lands and pay the taxes thereon as the statute directs. The answer was—

> "objections merely technical, interposed whimsically so as to defeat the proposed listing of the lands, and so as to work its forfeiture."

The primary courts, basing their judgments on such objections, designed (1) to deny this plaintiff its day in court; (2) to deny to it the right to list its lands and pay the taxes thereon, dismissed the petitions, *without the right to amend the same;* and that design, thus formed and executed in the primary courts, was consummated by the judgment of the highest court of the State now here for review. Nothing can be more obvious than the fact that, by this device or trick of procedure, this plaintiff was deprived of his day in Court because the only judgment really rendered by the primary and appellate courts of Kentucky was thus: *We deny you a*

hearing by dismissing or striking out the petition on which you claim the right to be heard; and we further deny you the right to be heard upon such petition in an amended form. This Court has held in a leading case that such judicial conduct is a typical illustration of the denial of due process of law. In Hovey *v.* Elliott, 167 U. S., 409, in which Chief Justice Waite erected the most enduring monument to his critical learning, it was held that due process of law signifies the right of a party to be heard on his pleadings filed: and that the striking out arbitrarily of such pleadings, without such a hearing, is a denial of due process of law. In that case the answer of the defendant, setting up his defense, was striken from the files and dismissed, just as the petition of this plaintiff, setting up his defense against the effort to forfeit or confiscate his land, was dismised. In his able treatise on *Due Process of Law*, pp. 170 and 425, McGehee cites Hovey *v.* Elliott as a case in which "striking out answers held denial of hearing," and consequently of due process. The formula used in the primary courts of Kentucky, and affirmed by the Court of Appeals, as the means of denying this plaintiff a hearing was this:

> "It is further ordered and adjudged that the motion to dismiss the petition and application be, and the same is, now sustained, and that the petition and application be, and the same is now, dismissed."

In Postal Teleg. Cable Co. *v.* Adams, 155 U. S., 689, this Court said:

> "The substance, and not the shadow, determines the validity of the exercise of the power."

Despite the fact that this plaintiff in error did everything in its power to pay the taxes due upon its lands by tendering or attempting to tender the amount claimed in Court as it had the right to do under the act lawfully construed, it was denied by a mere trick of procedure, the right to pay, and its lands were thereupon confiscated in defiance of the prin-

ciples settled by this Court in United States *v.* Lee, 106 U. S., 196. Despite the deliberate and legal efforts made by this plaintiff in error to comply with the requirements of Article III, the highest Court of Kentucky so construed the tax system of that State as to take away from said plaintiff its constitutional right to pay the taxes charged upon its lands, and thereafter forfeited the same upon the pretence that it had not performed those acts which the courts of Kentucky deliberately and designedly denied it the right to perform, in open violation of the due process of law clause of the Constitution of the United States.

V.

Plaintiff in error has been denied the equal protection of the laws guaranteed by the Fourteenth Amendment.

Justice Hobson in his dissenting opinion has demonstrated with irresistible clearness that the article in question is void because it embodies—

> "a deliberate attempt on the part of the Legislature to deny the equal protection of the laws to the owners of the land titles referred to, *and to provide as to the holders of these land titles an entirely different system from that provided for the holders of other species of property.*"

He reaches that conclusion by the following process of reasoning:

> "When an act in not punishable under the law in existence when it is done, it cannot be made punishable by the Legislature by a law subsequently passed; and upon like principles, where an act is punishable in a certain way when it is done, the Legislature cannot by a subsequent law add to the punishment or penalty. The Legislature cannot deny to anyone the equal protection of the laws; and in my judgment article three of the Revenue Act of 1906 is void, both on the ground that it is *ex post facto* legislation, and that it denies the

holders of land titles referred to the equal protection of the laws. The Act was approved March 15, 1906. It took effect about ninety days thereafter. The first section of the Act makes it the duty of every owner or claimant of land to pay all the taxes which had been assessed or should have been assessed against him or those under whom he claims, as of the 15th day of September, 1901, 1902, 1903, 1904 and 1905. And if it had not been assessed for any of these years, the act made it his duty to assess the land and pay the taxes, interest and penalty therein provided for. His failure to do this is made a cause for the forfeiture of his title, but this forfeiture shall be extinguished if on or before March 1, 1907, he lists the land and pays the tazes with the interest and penalties provided by law in case of the redemption of land sold for the non-payment of taxes. When land is sold for the non-payment of taxes, a penalty of fifteen per cent is added, and the taxes bear interest at the rate of ten per cent. So that, the meaning of the act is that the owner of land who had failed to list it for the years named must list it after the act takes effect and pay a penalty of fifteen per cent., also interest on the taxes at ten per cent per annum from the time he was delinquent, that is, from the time the land should have been assessed. By the law in force up to the time this act took effect, the owner of land which had been omitted from assessment might voluntarily have it assessed at any time and pay the taxes without interest or penalties. If he failed to list it voluntarily, and a proceeding was instituted against him under section 4241 of the Kentucky Statutes, he was liable to a penalty of twenty per cent, which went to the officer instituting the proceeding; but, even in this case, he was not liable for interest at ten per cent on the taxes; and if he made the assessment voluntarily without a proceeding being instituted against him, he was not liable for the penalty of twenty per cent. While the act gives him until March 1, 1907, to list his property and pay the taxes, from the moment the act took effect the only way that he could escape the forfeiture of his title was to pay not only the taxes but the interest and penalty. The act does not give him a certain length of time to list his property and provides that if he fails to list within that time he shall be subject to the penalty, but it imposed the penalty upon all who are

delinquent in listing their land and who would escape the forfeiture of their title by listing it after the act takes effect. It is said that so much of the act as imposes the penalty for the past delinquency may be rejected, and that the balance of the act may stand; but this is not a case in which that rule can be applied—for the reason that the act forfeits the title of all persons who had failed to list their land for the years named, and the only way in which they can escape the forfeiture is by paying the taxes with interest and penalty. If they do not pay the taxes, interest and penalty, the forfeiture stands. If that part of the act which provides for the extinguishment of the forfeiture is invalid, then there is no way in which the owner can escape the forfeiture. Besides, this is an essential part of the whole scheme of the act, and it cannot be presumed that the Legislature would have passed the act without this. The forfeiture of the titles of the owners is the purpose of the act. There could not be a clearer case of Legislative intention to punish retrospectively.

"By the general law the person owning land at the time it should be assessed is not only liable for the taxes but remains bound therefor; by this article the present owner's land is forfeited to the Commonwealth for the non-payment of taxes by the former owner. By the general law if the occupant of land pays the taxes thereon, he is entitled to recover of the owner the amount so paid with interest, and has a lien on the land therefor; by this article, the fact that the land has been listed for taxation and the taxes paid by the occupant, does not prevent the forfeiture as therein set out. By the general law land may be assessed retrospectively at any time not later than five years but not to prejudice the rights of purchasers acquired in the meantime; by this article the purchaser is required to pay the taxes with interest and penalty. By the general law if the owner sells the land after the first of February of the year in which the taxes are due and payable, it is the duty of the owner to pay the taxes; by this article the purchaser's title is forfeited if he does not pay them. By the general law where property has been sold for taxes, the owner may redeem it within two years; by this article the owner forfeits his title to the land if he fails to assess it and pays the taxes thereon as therein provided. By the general law if the

owner fails to assess his property, it may be assessed retrospectively, but the taxes are then collected as other taxes; by this article the taxes are not collected as other taxes, but must be paid at once with interest and penalties to avoid a forfeiture of the title. By section four of this article, before the defendant may redeem, he must pay not only the amount of unpaid taxes charged, but those that ought to have been charged against those under whom he claims for fifty years preceding the filing of the counterclaim. No such provision is found in the general law relating to other property, and there is no provision in the general law for double taxation of the same property, and the payment of the taxes by each claimant where there are two claimants to it.

"A reading of the article shows that it was a deliberate attempt on the part of the Legislature to deny the equal protection of the laws to the owners of the land titles referred to, and to provide as to the holders of these land titles an entirely different system from that provided for the holders of other species of property. It is, therefore, in my judgment void both under the Constitution of this State and the Constitution of the United States.

"For these reasons I dissent from the opinion of the Court."

Mr. Conklin, a member of the Committee that framed the Fourteenth Amendment, has told this Court that:

> "At the time the Fourteenth Amendment was ratified, as the records of the two Houses will show, individuals and joint stock companies were appealing for congressional and administrative protection against *invidious and discriminating State and local taxes*. One instance was that of an express company, whose stock was owned largely by citizens of the State of New York, who came with petitions and bills seeking acts of Congress to aid them *in resisting what they deemed oppressive taxation in two States*, and ruinous rules of damages applied under State Laws."
>
> Guthrie, pp. 24-25.

Thus we know for certain that one of the leading motives that prompted the addition of the final clause of Section 1,

purely of American origin, forbidding any State to "deny to any person within its jurisdiction the equal protection of the laws," was to prevent just such "invidious and discriminating" tax legislation as is embodied in the article in question. The protection this plaintiff in error seeks in this case under that clause is just the protection it was intended to guarantee. All of which is respectfully submitted.

HANNIS TAYLOR,
Of Counsel for Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
OCT 25 1910
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

No. 22.

KENTUCKY UNION COMPANY, - - - - - *Plaintiff in Error,*

versus

COMMONWEALTH OF KENTUCKY, - - - *Defendant in Error.*

No. 47.

EASTERN KENTUCKY COAL LANDS CORPORATION, *Plaintiff in Error,*

versus

COMMONWEALTH OF KENTUCKY, - - - *Defendant in Error.*

No. 48.

EASTERN KENTUCKY COAL LANDS CORPORATION, *Plaintiff in Error,*

versus

COMMONWEALTH OF KENTUCKY, - - - *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR DEFENDANTS IN ERROR, WITH APPENDIX OF KENTUCKY CASES.

JAMES BREATHITT,
Atty. Gen. of the Com. of Ky.
J. W. H. STEWART,
JOHN P. HAGER,
DAVID W. BAIRD,
Counsel for Defendants in Error.

Z. T. VINSON,
JOHN H. HOLT,
J. H. JEFFRIES,
AARON KOHN,
Of Counsel.

Courier-Journal Co., Incorporated, Louisville, Ky.

INDEX AND POINTS.

PAGE

1. Statement of Case..... 1
2. Assignment of Errors..... 11
3. Peculiar Situation of Eastern Kentucky Coal Lands Cases 13
4. Virginia Compact 16

Eastern Kentucky Coal Lands v. Commonwealth, 127 Ky. 667.
Barney v. Hawkins, 5 Peter, 457.

5. The Statute Affords Due Process..... 24

Eastern Kentucky Coal Lands v. Commonwealth, 127 Ky. 667.
King v. Mullins, 171 U. S. 404.
King v. West Virginia, 216 U. S. 92.
Fay v. Crozier, 156 Fed. 486 (217 U. S. 455).
Citizens Nat'l Bank v. Ky., 217 U. S. 443.

6. The Statute is Neither an *Ex Post Facto* Nor Retrospective Law 35

Eastern Kentucky Coal Lands v. Commonwealth, 127 Ky. 667.
King v. Mullins, 171 U. S. 404, 428.
King v. West Virginia, 216 U. S. 92.
Calder v. Bull, 3 Dallas, 386.
Fla. R. R. v. Reynolds, 183 U. S. 475.
Elder v. Wood, 208 U. S. 226.
Citizens Nat'l Bank v. Ky., 217 U. S. 443.

7. The Statute Does Not Deny to the Plaintiffs in Error the Equal Protection of the Laws, Nor Does it Double-tax Them 65

Eastern Kentucky Coal Lands v. Commonwealth, 127 Ky. 667.
King v. Mullins, 171 U. S. 404.
Fla. R. R. v. Reynolds, 183 U. S. 475.
Elder v. Wood, 208 U. S. 226.
Olds v. Commonwealth, 3 A. K. Marshall, 465.
Citizens Nat'l Bank v. Ky., 217 U. S. 443.

8. Non-Federal Questions 74

APPENDIX.

PAGE

1. Eastern Kentucky Coal Lands Co. v. Ky., 127 Ky. 667 1
2. Eastern Kentucky Coal Lands Co. v. Ky., 111 S. W. 362 49
3. Ky. Union v. Ky., 128 Ky. 610 54
4. Commonwealth of Kentucky v. Gatliff, 116 S. W. 263 65
5. Lockard v. Ky., 133 Ky. 369 70

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

No. 22.

KENTUCKY UNION COMPANY, - - *Plaintiff in Error,*

vs.

COMMONWEALTH OF KENTUCKY, - *Defendant in Error.*

No. 47.

EASTERN KENTUCKY COAL LANDS CORPORATION, - - - - - - - *Plaintiff in Error.*

vs.

COMMONWEALTH OF KENTUCKY, - *Defendant in Error.*

No. 48.

EASTERN KENTUCKY COAL LANDS CORPORATION, - - - - - - - *Plaintiff in Error.*

vs.

COMMONWEALTH OF KENTUCKY, - *Defendant in Error.*

BRIEF FOR DEFENDANTS IN ERROR.

These cases are heard together as involving the same questions of law, and come here upon writs of error to the Court of Appeals of Kentucky complaining of judgments forfeiting to the Commonwealth of Kentucky the title which plaintiffs in error, Eastern Kentucky Coal

Lands Corporation, claim under patents issued to their predecessors in title, covering over one half million acres of land, situated in the counties of Letcher, Knott, Floyd and Pike, in the State of Kentucky; and the title issued to the predecessor in title of the plaintiff in error, Kentucky Union Company, aggregating forty thousand acres, situated in the county of Leslie.

The patents under which plaintiff in error, Eastern Kentucky Coal Lands Corporation, claims were issued by the State of Virginia prior to the separation of the State of Kentucky from that Commonwealth [1792], or were issued by the State of Kentucky immediately after it became a State, upon surveys made prior thereto.

The patents under which plaintiff in error, Kentucky Union Company, claims were issued by the Commonwealth of Kentucky in the year 1872.

The proceedings to forfeit the land and all right, title and claim of the plaintiffs in error thereto were instituted under and pursuant to the provisions of Article 3 of an act of the Commonwealth of Kentucky, approved March 15, 1906, constituting chapter 22 of the Acts of 1906, and Sections 4076-b to 4076-k, Statutes of Kentucky, Edition of 1909, and being a part of a comprehensive act of revenue for the State. The purpose of said Article 3 was to require owners of these outstanding patents which have cast a cloud upon the title of the settlers and possessors of the land and retarded the growth of the State either to list their lands for taxation or to give up their claims under the patent. (Lockhard v. Commonwealth, 133 Ky.

369.) Neither the legality nor the wisdom of the object to be accomplished can be questioned.

In King v. Mullins, 171 U. S. 404, on page 413, Mr. Justice Harlan, speaking for this court, and quoting from Wilds' Lessee v. Serpell, 10 Gratt. 405, 408, said:

> "Upon these subjects I have nothing, therefore, to say upon this occasion except that, considering the peculiar condition of things in that part of the State lying west of the Allegheny Mountains and the serious check to population and the improvement of the country and the development of its resources growing out of it, a resort to the stringent measures of legislation that were adopted was, in my opinion, as wise and expedient as the constitutional power of the Legislature to enact them was clear and unquestionable."

In view of the decisions of this court under the laws of West Virginia in every essential similar to the statute of Kentucky here complained of, in the cases of—

> King v. Mullins, 171 U. S. 404,
> King v. W. Va., 216 U. S. 92,
> Fay v. Crozier, 156 Fed. 486 (in which case writ of error from this court was dismissed as frivolous), 217 U. S. 455,

and in view of the careful statement of the facts and consideration of the questions of law involved by the Court of Appeals of Kentucky in the cases of—

> Eastern Kentucky Coal Lands Corporation v. Commonwealth, 127 Ky. 667,
> Eastern Kentucky Coal Lands Corporation v. Commonwealth, 111 S. W. 362 (not to be reported),

Kentucky Union Co. v. Commonwealth, 128 Ky. 610,
Commonwealth v. Gatliff, 116 S. W. 263 (not yet reported),
Lockhard v. Commonwealth, 133 Ky. 369,

little that is new remains to be said.

Before considering the questions of law involved, we will in a brief way refer to the conditions existing in that part of the State of Kentucky more primarily affected by the Act of 1906 and causes leading up to its enactment.

Chief Justice O'Rear, in the opinion delivered by him for the Court of Appeals of Kentucky, in the case of—

Eastern Kentucky Coal Lands Corporation v. Commonwealth, 127 Ky. 667,

and Judge Dayton, in the case of—

Fay v. Crozier, 156 Fed. 486,

have stated these conditions so forcefully and accurately that it is necessary for us to add only a few words.

Practically all of the eastern part of the State of Kentucky, comprising about twenty counties, is covered by grants issued by the State of Virginia prior to the separation of Kentucky from that Commonwealth. These patents ranged in acreage from a few hundred to 650,000, and aggregated about two and a half million acres. Of the entire boundary there is not to exceed fifteen thousand acres held or possessed by persons in privity with these patents. Those so possessed are situated almost exclusively in the county of Lawrence (not involved in the

present litigation) where, for some unexplainable reason, the patentees named in the original patents seated and possessed them; and those in privity in title with them have owned and possessed the property ever since. With this insignificant exception, no part of this two million five hundred thousand acres was ever possessed or doubtless ever seen by the original patentee or by any person connecting with him in title; and in this statement is included the vendor and chief owner of the stock of the plaintiff in error, Eastern Kentucky Coal Lands Corporation, Mr. C. B. Hillhouse.

By far the larger part of these patents were issued by the State of Virginia prior to 1792, and the remainder by Kentucky prior to 1800 upon Virginia surveys made prior to the year 1792. A diligent search of the records where such information would be found discloses the fact that the sum total of all taxes paid by the claimants of all these patents to the State of Kentucky since is organization down to the present time does not exceed seventy-five dollars, and all of that was paid either in or prior to the year 1825, and nothing whatever has been paid since.

In the territory embraced within these patents there live about three hundred thousand citizens of the State of Kentucky. Carved out of it are twenty counties, each with its court houses and other public buildings; scattered over it are school houses, doubtless to the number of two thousand or more, municipalities and municipal buildings, internal improvements of all kinds, railroads, county roads, turnpikes and all other improvements com-

mon to modern civilization and development, yet none of these is based upon title derived from the patents or grants referred to. The citizens and occupants who have built up the State, saving alone the insignificant exception of about fifteen thousand acres referred to, derive their title from patents issued by the State of Kentucky upon which they have entered, built their homes and erected a Commonwealth. This is the class of people that the plaintiff in error, outside of the record at least, delights in calling "squatters."

It is doubted whether there remains any land in this territory not granted by the Commonwealth of Kentucky to its citizens; but owing to the loose manner pursued by the State of Virginia, and which was followed by Kentucky, in the organization of its land office and in issuing patents without any rules or regulations as to location, not only the Virginia grants, but the Kentucky patents overlap or lie one upon the other, sometimes three, four or five deep; and it is possible that there remains in segregated spots small parcels of land of a fraction of an acre each or perhaps two or three acres covered alone by grants issued by the State of Virginia. It was to cover these spots, these small segregated tracts, that the predecessor in title of the plaintiff in error, Kentucky Union Company, secured the patents aggregating forty thousand acres.

For two or three years under the laws of Kentucky, including the year 1872, in certain parts of the State one person could secure a patent for any number of acres, and at that time what is known as Kentucky "blanket

surveys" were issued. These would be issued for many thousand acres, excluding such patents as had been theretofore issued by the State of Kentucky lying within the inclusive grant, the number of acres thus expressly excluded being arbitrarily named and without any reference to the number of acres that had been theretofore actually granted by the State; the purpose, as stated, being to save and hold out whatever might remain uncovered by the prior grants and which usually consisted of a small acreage scattered and segregated one piece from the other, and mostly lying within the enclosed farm of a citizen. Like those claiming under Virginia grants, there was no settlement or occupancy of these Kentucky "blankets," and no taxes paid upon them. This is the character of title under which plaintiff in error, Kentucky Union Company, claims. Though issued in 1872, no possession whatsoever was taken under the patent and no taxes whatsoever paid thereupon.

The grantees named in the patents issued by the State of Virginia have necessarily long since died, in nearly all instances intestate. Their descendants are numerous and scattered all over the United States and in various countries. It has been the custom of persons dealing in wildcat schemes to claim to represent the heirs or devisees or other persons connecting in title with them, and to sell blocks of land upon the market, exhibiting what purports to be a perfect chain of title. Whether or not persons claiming to be the descendants are in fact true descendants, of course, is not shown by the record, and by reason thereof many separate and distinct chains of title, each

and all purporting to be the true one, have been placed upon the market, and thousands of people scattered all over the United States have been defrauded out of their money, many of them selling their properties in their native State to come to Kentucky to possess their cheaply-acquired fortune, only to find that they had been victimized; that the title to the property claimed by them was wholly defective, and that the land they hoped to procure was owned, occupied and possessed by others, who, with characteristic Southern hospitality and generosity, contributed thousands of dollars to raise the necessary funds with which to return these deluded people to their homes.

The plaintiff in error, the Eastern Kentucky Coal Lands Corporation, claims "an" interest in these Virginia patents aggregating above five hundred thousand acres, acquired from some of the descendants of the original patentees; but there is nothing upon record in any of the counties showing the investiture of title or any interest in it, nor in its vendor, Mr. Hillhouse, they resting their claim upon what they allege to be unrecorded instruments.

Efforts made by the State of Kentucky to remove this incubus are so well stated by Chief Justice O'Rear in the Opinion of the Court of Appeals, written by him, that it is not necessary to further refer to it.

We deem it necessary to add only that this dealing in lands under the Virginia grants became active only after the year 1876, when the case of Marshall v. McDaniel, 12 Bush, 378, was decided, wherein it was held that the legislative forfeiture provided by the Legislature of Ken-

tucky in 1825 was unconstitutional. This act was based upon a similar act of the State of Virginia which the Supreme Court of that State held constitutional, and assuming that the similar act would be so held in the State of Kentucky, those claiming title under the Virginia grants abandoned any claim thereto and never renewed the same until after the Court of Appeals of Kentucky in the case stated decided the act to be unconstitutional.

Under these conditions, and as stated by Chief Justice O'Rear, the Legislature of Kentucky passed the Revenue Act of 1906, embodying in it what is known as Article 3. This article, in conformity with constitutional provisions, required all owners or claimants of all lands in the State of Kentucky to list the same for taxation; and further provided that where they had been in arrears in so listing or in the payment of taxes for a number of years, they should list the same by petition filed in the county court on or before January 1, 1907. By a further provision of the article it was made the duty of the Commonwealth attorney for the district in which the land lay to institute proceedings to forfeit such land as was thus in arrears and application to list which had not been filed in the county court on or before such date and the taxes thereon paid as provided in the statute.

Under this act plaintiff in error, Eastern Kentucky Coal Lands Corporation, filed its several applications in the county courts of Floyd, Pike, Knott and Letcher, upon which proceedings were had and judgment entered by the county court; that the applicant had not complied

with the provisions of the act, and therefore declined to list same.

Upon appeals to the circuit courts of the four counties named, these judgments of the county courts were affirmed. Plaintiff in error prosecuted an appeal from these judgments to the Court of Appeals, which affirmed the judgments of the circuit courts in an opinion by Chief Justice O'Rear, and it is from this decision of the Court of Appeals that the writ of error in Case No. 47 is sued out.

Case No. 48 arises out of an action instituted by the Commonwealth attorneys in the four-named counties against the petitioner in error to forfeit their title and claim to the lands described because of their failure to comply with Article 3. These proceedings were instituted in the circuit courts of the four counties, and judgment of forfeiture entered. From these judgments of forfeiture plaintiff in error prosecuted an appeal to the Court of Appeals, which court, in an unreported opinion, but published in 111 S. W. Reporter, p. 362, affirmed the judgments of the lower courts, relying upon the opinion filed upon the former appeal. This writ of error, Case No. 48, is sued out from that judgment of the Court of Appeals of Kentucky in so far as it affirmed the judgment of the Pike Circuit Court alone. There is not thus before this court for review the action of the Court of Appeals with respect to the judgment of forfeiture of the courts of Floyd, Knott or Letcher counties.

Case No. 22 is a writ of error to the Court of Appeals of Kentucky in affirming the judgment of the Leslie Cir-

cuit Court in forfeiting the title of the plaintiff in error, Kentucky Union Company, to the land claimed by it and aggregating forty thousand acres. The plaintiff in error, Kentucky Union Company, did not file or attempt to file any application to list this property, nor did it file a defense to the action instituted by the Commonwealth attorney for the district to forfeit their title, taking no steps whatever to comply with the Act of 1906. It bases its defense exclusively upon the unconstitutionality of Article 3, and upon its demurrer to the petition of forfeiture being overruled, declined to answer, and the judgment of forfeiture being entered, prosecuted an appeal to the Court of Appeals, and upon the judgment of the circuit court being affirmed by that court, sued out this writ of error.

On this writ we are not concerned with whether the act violates any limitation of the State Constitution, nor with its construction as a State law further than whether, as construed and enforced, it violates the Federal Constitution.

The following assignment of errors, copied from record in Cases Nos. 47 and 48, cover errors assigned in Case No. 22:

ASSIGNMENT OF ERRORS.

First. The court erred in affirming the judgments of the Pike County, Floyd County, Letcher County and Knott County circuit courts, the judgments of each of said circuit courts having been reviewed and affirmed on this appeal.

Second. The court erred in upholding the validity of Article 3 of the Act of March 15, 1906, of the Legislature of Kentucky:

(1) Because said Article 3 violates the compact between Virginia and Kentucky of December 18, 1789.

(2) Because said Article 3 violates the provisions of the Constitution of Kentucky and the Constitution of the United States, requiring due process of law.

(3) Because said Article 3 violates Section 10 of Article 1 of the Constitution of the United States, which declares that no State shall pass any bill of attainder or *ex post facto* law.

(4) Because said Article 3 violates Section 10 of Article 1 of the Constitution of the United States which provides that no State shall pass any law impairing the obligation of contracts.

(5) Because said Article 3 violates the Fourteenth Amendment of the Constitution of the United States, which provides that no State shall deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Third. Because that irrespective of the invalidity of said provisions of Article 3 of said act this suit by the plaintiff herein against this defendant violates the aforesaid sections, articles and amendments of the Constitution of the United States because this defendant has complied with any and all (if any) of the provisions of said Revenue Act that are valid so far as the same are applicable to this defendant; if any of said provisions are

valid with respect to this defendant; and this defendant has been guilty of no wrong and has not done or omitted to do any act which would forfeit this defendant's title or claim to any of said lands even if said provisions of said Article 3 of said Revenue Act were valid.

Fourth. Because said Article 3 is an act of spoliation and lawless confiscation and is revolutionary and subsersive of all constitutional and orderly government.

THE JUDGMENT IN THE EASTERN KENTUCKY COAL LANDS CORPORATION CASES MUST BE AFFIRMED, BECAUSE NO FEDERAL QUESTION IS PRESENTED.

The plaintiff in error, Eastern Kentucky Coal Lands Corporation, does not claim to be the owner of all the land described in the several patents copied into the applications filed in the four separate counties, but expressly disavows ownership or claim of any land within the boundary of any of the patents its right of entry, to which has been tolled by the adverse possession of others. The applications do not seek to describe either the part which has thus been held by adverse claimants, nor the part remaining to which they do assert claim and ownership. The applications filed in each county are identical except as to the patents described in them respectively. Paragraph 5 of the application filed in each county, and shown as to Letcher county on page 8 of the record in Action No. 47, expressly disavows ownership of any improvements upon said tracts of land, or of any of said land adversely held by others for a period sufficient to

toll the petitioner's right of entry. It therefore follows that the only land it claims, as alleged in its application—but putting it in a different form from that stated in its application—is such land and only such land as is not owned by some other person; and it sought to list only such land within the boundaries of the patents described as is not owned by some other person, limiting their claim of ownership to that land. As to this land, applicant further confesses and alleges, in its application that neither it nor any of its predecessors in title have paid any taxes thereupon, nor listed same for the years stated in the statute. The effect of the judgment of forfeiture is only to take from it its title and claim to this land, being only the land or title that it claims, and upon which no taxes, according to its allegation, have ever been paid by it or any other person.

There can be no question as to the right of the State of Kentucky to prescribe a mode for the said plaintiff in error to pay the taxes in arrears upon this land for the period of five years. By express constitutional and statutory provisions this land was taxable, and no question is raised by plaintiff in error as to the right of the Commonwealth to tax this land.

The statute further provides that the Commonwealth shall have a lien upon property to secure it in the payment of taxes for the period of five years; and the sole effect that Article 3 has upon the plaintiff in error with the respect to land owned and claimed by it and forfeited under the judgment, was to prescribe a different mode of arriving at the amount of taxes in arrears which the

plaintiff in error should pay, from that prescribed under previously-existing general law.

There is, therefore, no room or basis of claim upon the part of plaintiff in error, "The Eastern Kentucky Coal Lands Corporation," that any Federal right has been denied it. We will not trouble the court with argument here as to the right of the State of Kentucky to prescribe a different mode of ascertaining the amount of taxes in arrear from the mode which had theretofore prevailed under the general law, such right not being the subject of serious question. But as learned counsel for plaintiff in error have seriously presented various questions both of Federal and State right under their assignment of errors, and though we conceive these to be moot questions, we shall nevertheless briefly consider them, and in the same serious manner in which they are presented; and for convenience in discussing the Federal questions raised by the assignment they may be grouped as follows:

1. Does the act as construed impair the obligation of the compact between the State of Virginia and the State of Kentucky, known as the Virginia Compact, and under which the plaintiff in error claims?

2. Does it, by forfeiting the plaintiff in error's title to lands for failure to list them for taxation, deprive the plaintiff of its property without due process of law?

3. By requiring the plaintiff to list its lands or to pay taxes upon them for the years 1902-1906 both inclusive, assessible as of September, 1901 to 1905, is the act an *ex post facto* law?

4. Does the act, by its special provisions with reference to persons who have failed to list their lands for the years 1902 to 1906, both inclusive, deny to the plaintiff the equal protection of the laws?

The non-Federal questions may be grouped as follows:

A. That the plaintiff in error has complied with the statute of 1906 in so far as it is within its power so to do.

B. That in a general way the statute is an act of spoliation and lawless confiscation and is revolutionary and subsersive of all constitutional and orderly government.

C. That the act is repealed on its face.

We shall consider these several Federal and non-Federal questions in the order named.

I.

Virginia Compact.

The Court of Appeals of Kentucky, after reviewing the history of the Virginia Compact, adjudged the act in question to impair no obligation of that contract. Chief Justice O'Rear, in writing the opinion of the court on this question, said (127 Ky., at p. 705):

> "The act is claimed to be void, as violative of the Compact with Virginia. The compact, so far as here involved, has already been set out in the foregoing part of this opinion. As may be naturally expected,

that instrument has been before this court a number of times, as well as before the Supreme Court of the United States, for construction. It is conceded to be as obligatory upon this State to its fair intent as fully as if ingrafted in the Constitution of the State. Nay, more so, in that while the State might alter or abrogate provisions of its own Constitution, it is without power to either alter or ignore the compact. Green v. Biddle, 8 Wheat. 1; Lessee of Joseph Marblet v. Silk, 11 Pet. 1; Poindexter v. Greenbow, 114 U. S. 271. Among the first authoritative attempts on the part of this court to construe the compact was Boone v. Helm, 4 Dana, 403, although it had been discussed, indicating the views of certain of the judges, in Hays' Heirs v. McMurry, 1 Litt. 365, and in Beard v. Smith, 6 T. B. Mon. 430.

"In Boone v. Helm this court, speaking through Chief Justice Robertson, respecting the clauses of the compact now in question, said: 'All these expressions, taken together, mean, even according to their literal import, this, and only this: That as to the validity and effect of such claims to land as then existed under the Virginia land system for the district of Kentucky, the rights of the claimants, as then existing, whether perfect or inchoate, should be tested by the laws under which they had been acquired, and that Kentucky should not abolish those laws, or enact and enforce any statute destructive of the validity of such of those claims as were, according to the laws existing when they were acquired, valid and available. Then, if any such claimant had a good entry, it—that is, the entry—should ever remain good as a valid and legal location. If he had a survey, good according to the law under which it was made, it—that is, the survey—should continue to be held as having been, when made, legal and valid. If he had obtained a patent, it—that is, the patent—should be deemed, in the courts of Kentucky, to have vested in the patentee all the rights which were guaran-

teed by the laws of Virginia existing when it was issued. And if, at the time of the separation, one claimant had a perfect and another an imperfect title to the same land, each according to its degree valid and legal, both shall ever be held, in the like manner, to have been then good, and neither of them shall ever be invalidated by Kentucky. This seems to us to be the utmost latitude of the literal and intrinsic meaning of the compact. And it does not interdict prospective legislation by Kentucky, for perfecting any imperfect title which was good, in its degree, at the date of the compact, or of the separation, or for maintaining her own just authority as a sovereign, in procuring revenue, giving proper repose to honest occupants, preventing vexatious litigation, or in enacting and upholding, prospectively, any other just system of public economy, which Virginia herself might have adopted without rendering by retroaction that invalid which was valid under her laws. It is admitted in argument, and could not be plausibly denied, that prospective limitation and revenue laws, by Kentucky, affecting rights to land acquired from Virginia, are not interdicted by the compact.'

"In Kendall v. Slaughter, 1 A. K. Marsh. 378, involving the power of this State to change its limitation laws so as to give a shorter time than Virginia did at the separation for bringing actions, this court said: 'But whilst the legislative enactments of this country are by the compact not permitted to affect the validity of those rights, we are of opinion that instrument should not be construed so as to preclude the Legislature from either regulating the mode of action, or limiting the time it should be prosecuted, for the purpose of asserting those rights. That the section alluded to was not understood by the parties to that compact as inhibiting the Legislature from passing laws by which those rights might become forfeited is, we apprehend, apparent from other parts of that instrument; for it is furthermore in the latter

clause of the eighth section provided that 'no neglect of cultivation or improvement of any land, within either the proposed State or that of Virginia, belonging to the non-resident citizens of the other, shall subject such non-resident to forfeiture or other penalty, within the term of six years,' etc. If, then, notwithstanding the compact, laws of forfeiture may be enacted, no reason is perceived why the Legislature should not be allowed to regulate the limitation of actions; for, although possession may, in process of time, ripen into a perfect right to the land, it does so, under the efficacy of the laws of limitation, operating in the nature of a forfeiture upon the failure of the claimants in not asserting the right in due time.'

"These views are fully sustained by the Supreme Court of the United States in Hawkins v. Barney, 5 Pet. 457. This action also involved the validity of a seven-year statute of limitation passed by Kentucky, and applied to a claimant under a Virginia grant, whereas the period of limitation in Virginia applicable to such actions at the time of the separation was twenty years. That court commenting upon the compact, said: 'It can scarcely be supposed that Kentucky would have consented to accept a limited and crippled sovereignty; nor is it doing justice to Virginia to believe that she would have wished to reduce Kentucky to a state of vassalage. * * * Let the language of the compact be literally applied, and we have the anomaly presented of a sovereign State governed by the laws of another sovereign; of one-half the territory of a sovereign State hopelessly and forever subjected to the laws of another State. If the seventh article of the compact can be construed so as to make the limitation act of Virginia perpetual and unrepealable in Kentucky, then I know not on what principle the same rule can be precluded from applying to laws of descent, conveyance, devise, dower, curtesy, and, in fact, every law applicable to real estate. * * * The last member of the eighth

article of this compact distinctly recognizes the existence of the power in Kentucky to pass similar laws, notwithstanding the restriction of the seventh article, and also the probability of her resorting to the policy of such laws.'

"No one seems to have thought before that the power of the sovereign State of Kentucky was, or was intended to be, curtailed by the compact with Virginia respecting the right of the former to proceed in her own way to coerce taxes from all property within her dominion for her support. The right to levy and collect taxes from the citizens or property within its jurisdiction is inherent in a State. As a part of its coercive process, it may forfeit the title of recusant taxpayers, or distrain their property without judge or jury. The compact no more prevents the State from forfeiting the title of property whose owners refuse to list it and pay taxes upon it than it denies to this State the power to levy the taxes. Nor does the compact affect at all the question of procedure, jurisdiction of courts, the subsequent devolution of the title, requirements as to registry of subsequent conveyances, or the future duties and obligations to the State of the owners of such titles. The cases examined comment upon the fact and lay stress upon the point, that whatever Virginia herself could have done in subsequent legislation, as affecting the titles in question, Kentucky might also do. As we have seen, Virginia, at the time of the separation, had provided for a forfeiture of titles for a failure to pay the tax for three years, and has continuously since enacted such legislation. It was not a violation of the compact for Kentucky to enact the statute in question. It does not in the least impair or affect the validity of the patents issued by Virginia or under Virginia surveys, nor does it alter the right of any holder of such patents that was acquired under the laws of Virginia. They took the patents subject to the right and power of the

> sovereign to compel the payment of taxes on the land in the future, and subject to the correlative power in the sovereign to forfeit the titles to the State as a penalty for the non-payment of the taxes."

The provision of the compact under which the plaintiff in error claims a contract right is Section 7, which reads as follows:

> "Third, that all private rights and interests of lands within the said district derived from the laws of Virginia, prior to such separation, shall remain valid and secure under the laws of the proposed State and shall be determined by the laws now existing in this State."

Whatever may have been the misgivings originally attending the construction of this compact, it is now well settled that it was not intended to deny to the State of Kentucky the exercise of the same powers over the lands within her jurisdiction which Virginia could have exercised had the separation not taken place, and that the meaning of the seventh section of the compact was to insure the holders of grants from Virginia whatever right was vested in them under the grant as construed by the laws applicable at the time it was made. Though this was insured by the application to the grant of Section 10, Article 1, of the Federal Constitution, the State of Virginia by this provision in the compact intended to provide against any misgiving concerning the application of the Federal Constitution to the contract.

Green v. Biddle, 8 Wheat. 1.
Barney v. Hawkins, 5 Pet. 457.

McCrackin v. Bell, 3 A. K. Mar. 212.
Beard v. Smith, 6 T. B. M. 430.
Gaines v. Buford, 1 Dana, 481.
Boone v. Helm, 4 Dana, 403.
Rawlings v. Clark, 8 Dana, 15.

In Green v. Biddle, Mr. Justice Johnson (at p. 104) said:

> "I can not admit that it was ever the intention of the framers of this Constitution, or of the parties to this compact, or of the United States, in sanctioning that compact, that Kentucky should be forever chained down to a state of hopeless imbecility—embarrassed with a thousand minute discriminations drawn from the common law, refinements of mesne profits, set-offs, etc., appropriate to a state of society, and a state of property, having no analogy whatever to the actual state of things in Kentucky—and yet no power on earth existing to repeal or to alter, or to effect those accommodations to the ever-varying state of human things, which the necessities or improvements of society may require. * * * And if it be admitted that the State of Kentucky might in any one instance have legislated as far as the State of Virginia might have legislated on the same subject, I acknowledge that I can not perceive where the line is to be drawn so as to exclude the powers asserted under, at least, the first of the laws now under consideration."

It can not be questioned that the procedure provided as well as the purpose accomplished by Article 3 of the Kentucky Revenue Act of 1906 are sanctioned by the principles and practice of Virginia, as defined by its laws in vogue at the time of the separation. The condition of these laws is stated with official references in

the opinion of the Court of Appeals of Kentucky, 127 Ky. 667, and also—

Hutchinson's Land Titles, p. 4, Sections 7, 15, 77, 88, 149.
Wild's Lessee v. Serpell, 10 Grat. 408.
State v. Board, 10 Grat. 400.
Smith v. Chapman, 10 Grat. 445.
Hale v. Branscum, 10 Grat.
McClure v. Maitland, 24 W. Va. 561.
McClure v. Mauperture, 29 W. Va. 633.
Twiggs v. Schovallie, 4 W. Va. 463.
Smith v. Tharp, 17 W. Va. 221.
Hays v. Camden, 38 W. Va. 109.
Wiant v. Hays, 38 W. Va. 68.
State v. Sponagle, 45 W. Va. 415.
King v. Mullins, 171 U. S. 440.
Reed v. Dingess, 60 Fed. 21.
VanUnder v. Iron Co., 52 Fed. 851.
Armstrong v. Morrill, 14 Wall. 120.
Hawkins v. Barney, 5 Pet. 457.
Boone v. Helm, 4 Dana, 403.
Green v. Biddle, 8 Wheat. 1.
Marshall v. McDaniel, 12 Bush, 380.
Beard v. Smith, 6 Mon. 430.
State v. King (W. Va.), 63 S. E. 470.
King v. W. Va., 215 U. S. 616.

Upon these authorities, the condition of the law as it existed in Virginia at the time of the separation and upon principle and for the reasons stated in the opinion of the Court of Appeals of Kentucky in 127 Ky. 667, we submit that the application of Section 3 of the Revenue Act of 1906, as adjudged against the plaintiff in eror, does not impair the obligation of any contract which the plaintiff in error has with the Commonwealth of Kentucky growing out of the Virginia compact.

II.

Due Process.

To the contention that the act in question violates the Fourteenth Amendment to the Federal Constitution, in that it deprives the plaintiff in error of its property without due process of law, the Court of Appeals of Kentucky, through Chief Justice O'Rear responded as follows (127 Ky. 713):

> "The act is claimed to infringe both the Federal and State Constitutions, in that it attempts, so it is argued for appellant, to deprive citizens of their property without due process of law. This proposition involves the power of the State to forfeit lands of the owner or claimant because he failed to list or pay taxes on them. The power of the State to levy the tax is not to be questioned. No more is its power to coerce its payment. As listing the property for assessment is a necessary step towards collecting the tax, the State must have as ample power to compel that step as any other in the process of collecting the tax, or its whole power in the premises is reduced to the strength of the weakest incident. It is no longer controverted that the State may distrain the delinquent's property—may sell it by the most summary proceeding. No judicial action is necessary to perfect the title. 'In what important particular does this differ from the case of forfeitures,' says Judge Cooley in his work on Taxation (p. 464), except that to the proceedings which are to work the forfeitures there is added the one requirement of a public sale? But there are in the sale no elements of an adjudication. It does not stand in the place of one. Its purpose is only to bring to the public treasury the tax for which the sale is made. Incidently in the pro-

ceedings a purpose is kept in view not to sacrifice any further than shall be necessary the interests of the owner; and to this end notice of the sale is required, with a view to invite competition among bidders. But we are not aware of any constitutional principle that entitles a party to have his duty coerced by a public sale of property rather than by a forfeiture of it. A sale by a ministerial officer, which, as the closing step in administrative action, is to divest the owner of his title, is as much obnoxious to the charge that it deprives him of his freehold without a hearing, as is the legislative forfeiture.'

"That text was written before the opinion of the Supreme Court in King v. Mullins, *supra*, in which, in summing up on the West Virginia Constitution and statutes already noticed, the court said: 'We hold that the system established by West Virginia, under which lands liable to taxation are forfeited to the State by reason of the owner not having them placed or caused to be placed, during five consecutive years, on the proper land books for taxation, and caused himself to be charged with the taxes thereon, and under which, on petition required to be filed by the representative of the State in the proper circuit court, such lands are sold for the benefit of the school fund, with liberty to the owner, upon due notice of the proceeding, to intervene by petition and secure a redemption of his lands from the forfeiture declared by paying the taxes and charges due upon them, is not inconsistent with the due process of law required by the Constitution of the United States or the Constitution of the State.' This court, in Marshall v. McDaniel, 12 Bush, at page 383, said that it was within the power of the State to provide for a forfeiture of the owner's title if he should fail to list or pay taxes on his land; but it was held in that case that before the forfeiture could become effective, he must have an opportunity to be heard in the matter before some competent tribunal to try the question—

not whether it was right that his title should be forfeited, but whether the facts existed which, under the statute, worked a forfeiture. So in Harris v. Wood, 6 T. B. Mon. 643, this court held that the State was not required, in collecting its taxes, to submit the question of right or of the taxpayer's liability to a judicial tribunal or to a jury; that such had never been the law of the land. Under the act here involved, the owner is given a day in court. His title does not become forfeited till it is so adjudged in an action in the circuit court, to which he is made a party, and is summoned if within the court's jurisdiction, or proceeded against regularly by publication otherwise, and a regular trial is or may be had. The inquiry would be, in the trial, did he fail to list or pay the taxes within the time and in the manner prescribed by the statute? If he did fail, then the judgment will carry into effect the legislative fiat that his title shall be forfeited to the State. If he did not fail, then the proceeding to forfeit will be dismissed, and he will be left with his title as it was before.

"In this connection we will notice another objection made against the statute, which is that it is an *ex post facto* law; that it punishes an act or omission by forfeiture of property, which, when the act was omitted, was not so punishable by law. But such is not the fact. It is not the failure to list in the years 1901, 1902, 1903, 1904 and 1905 that works the forfeiture; but it is the failure after the passage of the act in 1906 to thereafter list the property for the five years named, and before January 1, 1907. It was within the power of the Legislature to forfeit for even one year's omission."

It has never been adjudged, so far as our investigation reaches, that it is not within the taxing power to forfeit the title of the owner to the property either for a failure on his part to list or for a failure on his part

to pay the tax levied. The only question that arises in the execution of this essential incident to the taxing power is whether in accomplishing the forfeiture due process, within the meaning of the Federal Constitution, has been followed. It is well established that due process within the exercise of the taxing power is not the same as due process inhering in the exercise of judicial power. The question has most frequently arisen where the forfeiture is inflicted without the judicial process known as office found. Whether or not the forfeiture may be accomplished by the mere mandate of the legislative act, we are not concerned in the case at bar, as the act here questioned provides for a judicial determination after due notice and hearing. Under the Constitution of Kentucky, as judicially determined by its highest court in this case and the cases therein cited (Marshall v. McDaniel, 12 Bush, 383), a forfeiture can not be inflicted merely by a legislative act, but only upon an ascertainment of a violation of the law in a judicial investigation. We are not here, however, concerned, with matters of State law or their construction, except in so far as they violate the limitations of the Federal Constitution. Under the Federal Constitution, judicial process is not always necessary as a condition precedent to the infliction of a penalty, nor is it necessary to the accomplishment of a forfeiture under the exercise of the taxing power.

King v. Mullins, 171 U. S. 404.
King v. West Virginia, 216 U. S. 92.
Wilson v. Standefer, 184 U. S. 399.
Soper v. Lawrence Bros., 201 U. S. 359.

Swan v. State, 188 U. S. 739.
Florida Railroad v. Reynolds, 183 U. S. 471.
McMicken v. U. S. 97 U. S. 204.
Oceanic Steamship v. Stranahan, 214 U. S. 320.
Ontario Land Co. v. Yordy, 212 U. S. 152.
Farnsworth v. Railroad, 92 U. S. 49.
Davidson v. New Orleans, 96 S. W. 97.
Schulenberg v. Harriman, 21 Wall. 44.
U. S. v. D'Repentigny, 5 Wall. 211.
Fairfax v. Hunter, 7 Cranch, 603.
Smith v. Maryland, 6 Cranch, 286.
State of W. Va. v. King, 63 S. E. 470, 64 W. Va. 546.
State v. Garnett, 66 S. E. 99.
Safe Deposit and Trust Co. v. Marberg, 72 Atl. 839, 110 Md. 410.
Kaiser v. Curry, 103 Pac. 344.
Polk v. Mutual Reserve Fund Life Association, 207 U. S. 310.

The question raised here is so thoroughly considered in the case of King v. Mullins, 171 U. S. 404, in an opinion delivered for the court by Mr. Justice Harlan, and followed in King v. W. Va., 216 U. S. 92, that nothing is left for argument. In those cases a legislative forfeiture, with provision for its removal by judicial process, for a failure of claimants under Virginia grants to list their property for taxation was upheld in accordance with the well-settled policy of both Virginia and West Virginia. The material difference between the West Virginia and the Virginia law upon this subject and Article 3 of the Kentucky law, here questioned, is that the Kentucky law expressly calls for judicial process as a condition precedent to a declaration of the forfeiture. Here the statute only creates the cause of forfeiture. Whether the

forfeiture has occurred must be judicially determined, and in the cases here on writ of error it was so determined.

In King v. Mullins, 171 U. S. 404, this court said (syl.):

> (2) "If the statutes of a State, in connection with its Constitution, give the taxpayer reasonable opportunity to protect his lands against a forfeiture, he has no ground to complain that his property has been taken without due process of law."
>
> (3) "Summary remedies, which could not be applied to cases of a judicial character, may be used in the collection of taxes."
>
> (4) "Due process of law in forfeiting lands for non-payment of taxes and failure to place them on the land books is furnished under a Constitution which provides that such failure for five years in succession shall, by operation of the Constitution itself, forfeit the title to the State, where the statutes provide the taxpayer a reasonable opportunity to protect his lands in a judicial proceeding, of which he is entitled to notice, and in which the court has authority to relieve him, upon reasonable terms, from the forfeiture."
>
> (7) "The system of West Virginia, forfeiting to the State lands not placed by the owner on the land books for taxation for five years, and selling such lands for the benefit of the school fund, with liberty to the owner upon motion to intervene and redeem his lands by paying the taxes and charges—is not inconsistent with due process of law."

Again, on page 436, in that case, it is said:

> "For the reasons stated, we hold that the system established by West Virginia, under which lands liable to taxation are forfeited to the State by reason of the owner not having them placed, or caused to be placed, during five consecutive years, on the proper land books for taxation, and caused himself to be charged with the taxes thereon, and under which, on petition required to be filed by the representatives of the State in the proper circuit court, such lands are sold for the benefit of the school fund, with liberty to the owner, upon due notice of the proceeding, to intervene by petition and secure a redemption of his lands from the forfeiture declared by paying the taxes and charges due upon them, is not inconsistent with the due process of law required by the Constitution of the United States or the Constitution of the State."

In Wilson v. Standifer, 184 U. S., at 415, Mr. Justice Shiras, in speaking for this court, said:

> "It is scarcely necessary to say that this court when asked to revise proceedings in State courts have always held that due process of law is afforded litigants if they have an opportunity to be heard at any time before final judgment is entered."

While office found at common law was a judicial inquiry, its purpose was, like a *livery of seisin*, to afford, by notoriety proof, of the divestment of the title. It has never been considered by this court that there cannot be a legislative equivalent of office found by any other notorious taking of possession under the forfeiture declared.

"Due process of law" as applied to proceedings for the levy and collection of tax does not imply nor require the right to such notice and hearing as are considered essential to the validity of the proceedings and judgment of judicial tribunals.

Whenever, by the laws of a State or by State authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, and provision is made for confirming or contesting the charge thus imposed in the ordinary courts of justice, the judgment in such proceedings does not deprive the owner of his property without "due process of law."

> "If the mode of valuation is 'due process of law,' the difference in some details from the mode of valuing other descriptions and classes of property does not operate as a denial of the equal protection of the laws."

Syllabus in C., N. O. & T. P. R. R. Co. v. Com. of Kentucky (Kentucky R. R. tax cases), 115 U. S. 321, 339:

> "The collection of a tax is an administrative matter, and, provided some reasonable mode is given the taxpayer by which he may be heard upon the question of the legality of the tax, it is due process of law, and he can not complain."

Den, *ex dem*, Murray v. Hoboken Land & Improvement Co., 18 Howard, 272:

> "In tax proceedings the notice is sufficient to constitute due process of law where the statute names the time and place for the meeting of the assessing board."

Pittsburg, C., C. & St. L. R. Co. v. Backus, 154 U. S. 421.
Winona & St. Paul Land Co. v. Minnesota, 159 U. S. 534.

The last-named case deciding that:

"Opportunity to question the validity of the the amount of a tax, either before the amount is determined or in subsequent proceedings for its collection, is sufficient to make due process of law in the imposition of a tax or assessment upon property according to its value.

"The taxing power of a State is one of its highest attributes of sovereignty and essential to its continued existence."

U. P. R. Co. v. Penniston, 18 Wall. 5.

"The Fourteenth Amendment was not designed or intended to limit the taxing power of the States."

Slaughterhouse cases, 16 Wall. 36, 81.

"The presumption of constitutionality following taxing statutes is stronger than applies to laws generally, and only where a taxing system clearly and palpably violates the fundamental law will it be held invalid."

Henderson Bridge Co. v. Henderson, 173 U. S. 592, 615.
King v. Mullins, 171 U. S. 404, etc.
Conley v. Union Sewer Pipe Co., 184 U. S. 540, etc.
Bellsgap R. Co. v. Pa., 134 U. S. 232, etc.

"The State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion."

M. & M. Nat'l Bank v. Pa., 167 U. S. 461.

"Different rules apply to, and fix and limit the power of, classification in cases of taxation than in other cases."

Conley v. Union Sewer Pipe Co., 184 U. S. 562.

"Any system which gives to a party any means of questioning the validity or amount of the tax at some stage of the proceeding, either before it is determined and fixed, or to contest subsequent proceedings for collection, is due process."

Brannon, Fourteenth Amendment, 349, 351.

"The unconstitutionality of a statute may depend upon its conflict with the constitution of the State, or with that of the United States. If conflict with the State Constitution is the sole ground of attack, the Supreme Court of the State is the final authority."

M. & M. Nat'l Bank v. Pa., 167 U. S. 461.

Cited and followed in Michigan C. R. Co. v. Powers, 201 U. S. 244, at p. 291.

Speaking with reference to provisions of the Michigan Act and method of taxation therein prescribed, Judge Brewer, for the court, said:

"We have had frequent occasion to consider questions of State taxation in the light of the Federal Constitution, and the scope and limits of national interference are well settled. There is no general supervision on the part of the nation over State taxation, and in respect to the latter the State has, speaking generally, the freedom of a sovereign, both as to objects and methods."

In Ballard v. Hunter, 204 U. S. 241, 265, the court, by Mr. Justice McKenna, said:

> "In passing upon the other contentions of plaintiffs in error we are brought to the consideration of what is 'due process of law.' A precise definition has never been attempted. It does not always mean proceedings in court. Its fundamental requirement is an opportunity for a hearing and defense, but no fixed procedure is demanded. The process of proceedings may be adapted to the nature of the case." Citing Dent v. W. Va., 129 U. S. 114, and other cases.

In Hurtado v. California, 110 U. S. 516, Mr. Justice Matthews, speaking for the court, discussed at some length, and with citation of many authorities, the essential elements of "due process of law," and summed up the conclusions in these words, at page 239:

> "It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be 'due process of law.'"

This was quoted in the case of Reetz v. Michigan, 188 U. S. 505, 510. Following which it was said:

> "Neither is the right of appeal essential to due process of law."

After saying which, the court quotes the case of P., C., C. & St. L. R. Co. v. Backus, 154 U. S. 421, which involved the question whether the right of appeal was

essential to the validity of a taxing statute, and wherein the following words appear:

> "Equally fallacious is the contention that because, to the ordinary taxpayer, there is allowed not merely one hearing before the county officials, but also a right of appeal with a second hearing before the State Board, while only the one hearing before the latter board is given to railroad companies in respect to their property, therefore the latter are denied the equal protection of the laws. *If a single hearing is not due process, doubling it will not make it so.*"

King v. Mullins, 171 U. S. 404.
U. S. v. D'Repentigny, 5 Wall. 211 and cases there cited.

In the case at bar, however, the act provides for a judicial determination of the forfeiture as a condition to its accomplishment, and therefore we submit that the Kentucky act is not open to the claim that it violates the due process required by the Fourteenth Amendment to the Constitution.

EX POST FACTO AND RETROSPECTIVE LAWS.

To the contention that the act in question is an *ex post facto* law, forbidden by Section 10, Article I of the Federal Constitution, the Court of Appeals of Kentucky, in the opinion delivered by Chief Justice O'Rear, 127 Ky., at p. 716, said:

> "In this connection we will notice another objection made against the statute, which is that it is

> an *ex post facto* law; that it punishes an act or omission by forfeiture of property which, when the act was omitted, was not so punishable by law. But such is not the fact. It is not the failure to list in the years 1901, 1902, 1903, 1904, and 1905 that works the forfeiture, but it is the failure after the passage of the act in 1906 to thereafter list the property for the five years named, and before January 1, 1907. It was within the power of the Legislature to forfeit for even one year's omission."

Judge Hobson, in a dissenting opinion, was of the mind that the act is an *ex post facto* law not because of the listing feature of the statute, but because of its taxing feature—in that, it required payment of interest and penalties in addition to the tax assessed. On this proposition, he said (p. 723):

> "While the act gives him until March 1, 1907, to list his property and pay the taxes, from the moment the act took effect the only way that he could escape the forfeiture of his title was to pay not only the taxes, but the interest and penalty. The act does not give him a certain length of time to list his property, and provide that if he fails to list within that time he shall be subject to the penalty; but it imposed the penalty upon all who are delinquent in listing their land and who would escape the forfeiture of their title by listing it after the act takes effect."

Even this construction of the act violates no Federal right as adjudged by this court in King v. Mullins, 171 U. S. 428. It is there said:

> "If as contended, the State without an inquisition or proceeding of some kind declaring a for-

> feiture of the lands for failure during a named period to list them for taxation and by force alone of its Constitution or statutes, could take the absolute title to such lands, *still it was in its power by legislation to provide, as it did, a mode in which the attempted forfeiture or liability to forfeiture could be removed and the owner enabled to retain in the full possession of and title to the lands.*" (Italics ours.)

The reference made in Judge Hobson's opinion to the taxing feature of the statute is *dictum* as that feature is not involved in these cases. The forfeitures here adjudged are not for failure to pay taxes, but for failure to list the property for taxation. The valuation of the property in order to determine the amount of taxes due was never reached for the reason that that function is essentially subsequent to the function of listing. Property must be identified before it can be valued. This taxing feature of the statute was, however, pressed upon the court in the subsequent case of Kentucky Union Co. v. Commonwealth, 128 Ky. 610, in which the Court of Appeals in an opinion by Judge Lassing, on a petition for rehearing, at pages 625-6, said:

> "There can be no serious objection to Article 3, on the ground that it is an *ex post facto* law, in so far as the said article applies to years subsequent to 1906. But it is insisted that, as the act declares that delinquency for the years 1902, 1903, 1904, 1905, and 1906 shall be cause for forfeiture, which might have been removed on or before January 1, 1907, by the payment of the taxes and interest and penalties provided by law for the redemption of land sold for the non-payment of taxes, it visits

upon the delinquent greater penalties than he was subject to prior to the passage of the act. This would be true if the delinquent had voluntarily paid the taxes for those years; but the result is not necessarily the same had the delinquent been proceeded against by an officer authorized by law to collect back taxes; however, we are of opinion that the delinquent's liabilities for those years are to be measured by his liabilities had he volunteered to list and pay his taxes. It therefore follows that the article in so far as it requires the payment of interest and penalties for the years 1902, 1903, 1904, 1905, and 1906 is inoperative, and the delinquent for those years would be required to pay only taxes without interest and penalties. But, for the reasons and upon the authorities cited in the opinion and consistent with the rulings of this court, the elimination of the interest and penalties for the years 1902, 1903, 1904, 1905, and 1906 does not affect the other provisions of the article with respect to those years, or years subsequent thereto.

"As the appellant is under no disability, does not claim under a grant from the State of Virginia, and did not seek to list its property, or offer to pay the taxes for the years 1902, 1903, 1904, 1905, and 1906, either with or without interest and penalties, we hesitated in the opinion to pass sufficiently upon these questions raised by it. However, out of consideration entertained for the eminent counsel presenting them, we have expressed our views upon these points, in order that he may have the benefit of specific adjudication thereon."

We submit that whatever might be said concerning this feature of the act upon first impression, this judicial interpretation given to the act by the highest court of the State removes it from any claim that in this feature it might be an *ex post facto* law.

In Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, Mr. Justice Holmes, in speaking for the court of the respect entertained for local decisions on writs of error to State courts, said:

> "But whenever the tribunal in questions of this kind, great caution must be used in overruling the decision of the local authorities or in allowing it to be overruled."

In Missouri v. Dockey, 191 U. S. 165, this court in an opinion by Mr. Justice Holmes, in holding that on writ of error to a State Court, the construction placed upon the act by the State court will be followed in the consideration of the Federal questions involved, said:

> "Therefore, if the Supreme Court of the State construed the statutes as exempting express companies from this tax, and substituting another, as it is argued on behalf of the defendants in error that the statutes do, the petitioner cannot complain here. For the Legislature could exempt them, and the question whether it has done so or not is for the State courts to decide in their construction of its acts. Furthermore, if the State could grant a total exemption it could grant a partial exemption, and if it has done so, *de facto*, through its officers, the petitioner can not come here on an allegation that the officers acted as they did without the authority of the State. That, again, is for the State court to decide. The petitioner has no case under the Constitution of the United States, and nothing else is open. This is a writ of error to a State court, so that questions under the State Constitution and laws cannot be considered, as they might be on error to a subordinate court of the United States."

To the same effect is Citizens Nat'l Bank v. Ky., 217 U. S. 443.

The listing of property by the taxpayer is an essential feature of the exercise of the taxing power. Without it taxes could neither be levied nor collected. In the exercise of this power, it is competent for the State to adopt its own method of inquest and to enforce it by such penalties or forfeitures as it may select. Whether or not the property is the subject of taxation is not a condition to the right of the State to know what property the citizen has. It is therefore well established that independent of all other questions, the State may compel a listing by its subjects of their property and to enforce this right by forfeiture.

Belknap v. Commonwealth, 120 Ky. 59, laid down the broad principle regarding the duty of the citizen with reference to listing his property in this language:

> "From the foundation of the Commonwealth, the Legislature has imposed upon the owners of property the duty of reporting it for taxation."

In Olds v. Commonwealth, 3 A. K. Marshal, 465, Olds was summoned to appear to show cause why he should not be fined and thereby taxed for failing to give in his billiard table for taxation. He moved to dismiss the prosecution upon the ground, among others, that the billiard table in question was listed for taxes by one Hawkins, and, therefore, the Commonwealth should have pursued Hawkins. In the decision of the court by Judge Owsley, holding this defense to be clearly unmaintainable, the court said:

> "Nor could the circumstance of the billiard table having been listed for taxation, by Hawkins, have justified the court in dismissing the prosecution; for if the table in fact belonged to Olds, he was bound to have listed it in his own name for taxation, and cannot be excused for failing to do so, by the act of any other, in listing it in their name."

In the case of Commonwealth v. Taylor, 101 Ky. 325, the court held that the assessment of whiskey is a thing separate and apart from the collection of the tax upon it, and though the provisions of the law for the collection of a tax may be invalid, it is nevertheless the duty, under the requirements of the law to that effect, for the person claiming property in it to list it.

To the same effect, see the cases of—

> L. & N. v. Commonwealth, 85 Ky. 198.
> Commonwealth v. Toncray, 21 Ky. Law Reporter, 572 (unreported).

In Marshall v. McDaniel, 12 Bush. 378, quoted in King v. Mullins, 171 U. S. 421, it was held:

> "The right of the Commonwealth, through its executive and ministerial officers, to assess property for taxation, to ascertain the sum payable by each taxpayer, and to seize and sell his property in satisfaction of such sum, is not open to doubt. *It is equally clear the Legislature may impose upon the taxpayer the duty of listing his property for taxation, and may prescribe, for the neglect of the duty so imposed, penalties reaching even to the forfeiture of the estate not listed.*" (Italics ours.)

The forfeiture upheld in the case of King v. Mullins, 171 U. S., was for a failure to list the property. It

is too thoroughly established now to be questioned that an *ex post facto* law within the meaning of the Federal Constitution is one which makes criminal an act which was innocent when done, or makes a crime greater than it was before committed, or inflicts greater punishment than the law annexed to the crime when committed, or alters the legal rules of evidence and receives less or different testimony than the law required at the commission of the offense in order to convict the offender; that it extends to criminal or penal cases, and not to civil cases.

A retrospecive law is not an *ex post facto* law, unless it is penal in its nature. Even retrospective laws which deprive a citizen of a vested right to property are not forbidden by Section 10, Article I of the Federal Constitution, prohibiting States from passing *ex post facto* laws. If the State, by a retrospective law, deprives the citizen of his property not as a punishment it is not forbidden under this section of the Federal Constitution, though it may fall within the Fourteenth Amendment.

Calder v. Bull, 3 Dall. 386.
King v. Mullins, 171 U. S. 404.
Jaehne v. New York, 128 U. S. 189.
Burgese v. Salmon, 97 U. S. 381.
Murphy v. Ramsey, 114 U. S. 15.
Hawker v. N. Y., 170 U. S. 189.
Holden v. Minn., 137 U. S. 483.
McElvaine v. Brush, 142 U. S. 155.
Re Medley, 134 U. S. 160.
Mallett v. N. C., 181 U. S. 589.
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86.
Diamond v. Husbands, 68 Atl. 246.

State v. King, 63 S. E. 470; 64 W. Va. 546.
Gaines v. Burford, 1 Dana, 481.

The leading case is—

Calder v. Bull, 3 Dall. 386.

Cooley's Constitutional Limitations, 7 Ed., p. 373, states the rule as to *ex post facto* laws:

> "At an early day it was settled by authoritative decision in opposition to what might seem the more natural and obvious meaning of the term *ex post facto*, that in their scope and purposes these provisions were confined to laws respecting criminal punishments, and had no relation whatever to retrospective legislation of any other description. And it has, therefore, been repeatedly held, that retrospective laws, when not of a criminal nature, do not come in conflict with the National Constitution, unless obnoxious to its provisions on other grounds than their retrospective character."

To the same effect are decisions of Kentucky:

> Walston v. Commonwealth, 16 B. M. 15, cases there cited.

In Orr v. Gillman, 183 U. S. 278, the rule of Calder v. Bull was followed as being the well defined law of the land, defining the meaning of an *ex post facto* law. It was there said (p. 286):

> "The debates in the Federal convention upon Constitution show that the terms, 'ex post facto laws,' were understood in a restricted sense, relating to criminal cases only, and that the description of Blackstone of such laws was referred to for their meaning."

This was there said with reference to the Act of the State of New York of 1850, enlarging an Act of 1826 so as to impose a transfer or succession tax upon a succession already in the course of settlement, and which had been appropriated under a will probated prior to 1850. It was there held that such a law was not an *ex post facto* law. To the same effect see

Anderson's American Law, Vol. 1, 3395.
In re Sawyer, 124 U. S. 200.
Mallett v. North Carolina, 181 U. S. 589.
Hawker v. New York, 170 U. S. 189.

and a number of cases cited in an elaborate note to

People v. Hays, 140 N. Y. 484, S. C.; 37 Am. St. Rep. 573, Editor's note, pp. 582-576.

In the aspect of retroaction or retrospection, now under consideration, the case of Sturges v. Carter, 141 U. S. 517, is much like the case at bar. That action was a writ of error to the circuit court of the United States for the Northern District of Ohio, whose Constitution expressly prohibited retroactive laws. The proceeding there was brought under an Act of 1878 to collect from Sturges taxes on $100,000 of stock owned by him in the Western Union Telegraph Company during the years 1874, 1875, 1876, and 1877. Among the defenses it was contended that the law was retroactive in that, during the current years for which the taxes were omitted, the law then in vogue did not permit retroactive taxation beyond a year. Such was conceded to be the law, but the law of 1878 provided that the assessment of property

and the collection of taxes might be traced back for any period of time not exceeding four years, and it was there held that it applied to years antecedent to 1878, as well as to periods thereafter; and to the contention that the law was retroactive in that it upset vested rights, to-wit, settlements made between taxpayer and the State upon current assessments, the Supreme Court, in an opinion by Justice Woods, said:

> "In substance, this contention is that a taxpayer who has been evading the payment of the taxes due from him by making false returns, can shield himself behind the annual settlement made by the auditor with the treasurer, in which his returns were assumed to be true, and that the Legislature can pass no act by which the falsity of the returns can for a limited period (in this case four years) be exposed, and the payment of the taxes enforced—in other words, that the taxpayer has a vested right in the fruits of his false returns. Such a proposition can not be sustained. Foster v. Essex Bank, 16 Mass. 245.
>
> "In our opinion, no right of the taxpayer was invaded by the Act of 1878. His investments in bonds and stocks were subject to taxation; the taxes upon such investments were due to the State, and the Act of 1878 merely provided a method by which the taxes might be assessed and collected in spite of the annual settlements made by the auditor. It gave a new remedy to the State for enforcing a right which it had all the time possessed, namely: The right to the taxes upon property liable to taxation."

The case of Locke v. City of New Orleans, 71 U. S. (4 Wall 172), also involved the principle here at issue. There the Legislature of Louisiana, in 1850 passed an

Act authorizing each of the municipalities of the city of New Orleans to levy a tax on capital within its limits for the assessment rolls of 1848 and 1849 not to exceed the amounts imposed by existing ordinances. In an action to recover this tax it was contended that the law was an *ex post facto* law, but this was denied on a writ of error from this court to the Supreme Court of Louisiana, in an opinion by Mr. Justice Field, saying:

> "There was nothing in the position taken which entitled it to consideration. In the first place, the Act was subject to the imputation of being retrospective. It did not operate upon the past, or deprive the party of any vested rights. It simply authorized the imposition of a tax according to a previous assessment. In the second place, even if the law had been strictly retrospective, it would not have been within the constitutional limitation. * * *
>
> "The term *ex post facto*, literally construed, would apply to any act operating upon a previous fact, yet the restricted sense stated is the one in which it has always been held. It was the sense in which it was understood at the time the Constitution was adopted, both in this country and in England. 1 Bl. 46; Calder v. Bull, 3 Dall. 390."

Of like kind is the case of Carpenter v. Pennsylvania, 58 U. S., 17 Howard, 456. From that case it appears that in 1826 Pennsylvania enacted a law for the taxation of inheritances which should descend upon any other than father, mother, wife, children or lineal descendants, and confined the assessment of the tax to property which might be within the Commonwealth. The statute was so interpreted by the highest courts of the State. By an Act of 1850, the Act of 1826 was extended so as to apply

to property of all decedents, whether the property be within or without the State. One William Short died before the enactment of this statute, leaving his property to friends and collateral relations residing beyond the limits of the State, and the contention there was that the Act of 1850 could not be applied to this property without giving it retroactive effect in a sense to make it an *ex post facto* law; or, in other words, subjecting this inheritance to the payment of taxes to which it was not subjected under the law at the time the inheritance devolved. In denying this contention and sustaining the tax upon this property, Mr. Justice Campbell, speaking for the court, said, first quoting the Supreme Court of Pennsylvania:

> "More pointd words to make the Act of 1850 retrospective could not be chosen; and it will scarce be said the Legislature had not power to make it so, at least while the assets remain in the hands of the executor as administrator. No clause of the Constitution forbids it to extend a tax already laid, or to tax assets not taxed before; and in establishing its peculiar interpretation it has only done indirectly what it was competent to do directly."

Thereafter saying:

> "The Act of 1850, in enlarging the operation of the Act of 1826, and by extending the language of that Act beyond its legal import, is retrospective in its form; but its practical agency is, to subject to assessment property liable to taxation, to answer an existing exigency of the State, and to be collected in the course of future administration; and the language retrospective is of no importance except to

describe the property to be included in the assessment. And, as the Supreme Court has well said, 'In establishing its peculiar interpretation, it (the Legislature) has only done indirectly what it was competent to do directly.'

"But, if the Act of 1850 involved a change in the law of succession, and could be regarded as a civil regulation for the division of the estates of unmarried persons having no lineal heirs, and not as a fiscal imposition, this court could not pronounce it to be an *ex post facto* law within the 10th section of the 1st article of the Constitution. The debates in the Federal convention upon the Constitution show that the terms '*ex post facto* laws were understood in a restricted sense, relating to criminal cases only, and that the description of Blackstone of such laws was referred to for their meaning.' * * *

"The plaintiff's argument concedes that his case is not within the scope of this clause of the Constitution unless its limits are enlarged to embrace civil as well as criminal cases; and he insists that the court should depart from the adjudications heretofore made upon this subject. But this can not be done.' "

Contentions like those at bar were made in the case of Galusha v. Wendt, 114 Iowa, 597. In that case the State of Iowa, by a provision of 1897, for the first time provided that when property subject to taxation is withheld, overlooked, or for any reason not listed, or assessed, the county treasurer should, when apprised thereof, at any time within five years from the date assessment should have been made, assess the property and demand the tax. The law further provided for interest and penalties. It was there held by the Supreme Court that the Act was retroactive and required the

payment by the contestant of taxes for five years prior to the enactment of the statute, and that such a law was not antagonistic to any Constitutional provision, but it was also held that so much of the statute as provided interest of penalties was not applicable to property that had been omitted from taxation without the fault of the taxpayer, prior to the enactment of the statute; that as to such property the statute should be enforced, but without the interest or penalties; but that as to property thereafter omitted, the penalties and interest should be added. The court in that case said:

> "Of course, unless some provision of the State Constitution is violated, the fact that a statute is made retroactive by express term or by interpretation will not render it unconstitutional, save so far as contractual or vested rights are impaired. * * *
>
> "Irregularities or omissions in proceedings to enforce the payment of taxes may be corrected. Wade, Retro. Laws, Sections 252, 253. And the State may impose taxes for previous years to cure any such irregularities or omissions. Carpenter v. Pennsylvania, 17 How. 456; Tallman v. City of Janesville, 17 Wis. 71; Cross v. City of Milwaukee, 19 Wis. 509; Depauw v. City of New Albany, 22 Ind. 204; Olmstead v. Barber, 31 Minn. 256; Hall v. Commissioners, 177 Mass. 434. Statutes of this kind are not unconstitutional. They impair no contractual or property rights. People v. Seymour, 16 Cal. 332. * * *
>
> "The government has the same right to enforce the duty of the taxpayer to contribute to its support on account of omitted property that it has to enforce the payment of taxes previously determined. * * *
>
> "It seems to be conceded that the penalty authorized by the statute can not be enforced with refer-

ence to taxes which should have been assessed prior to the taking effect of the present Code. To enforce such a penal provision retrospectively would be unconstitutional. Cummings v. Missouri, 4 Wall 277, 325; County of Redwood v. Winona & St. Paul Land Co., 40 Minn. 512; County of Brown v. Winona & St. P. Land Co., 39 Minn. 380; Bartruff v. Remey, 15 Iowa 257. But the penalty may be enforced as to property omitted after the taking effect of the Code, and the whole section is not rendered unconstitutional by the fact that the provision as to the penalty cannot be supplied retrospectively. Gager v. Prout, 48 Ohio St. 89. The lower court, while not imposing the 50 per cent. penalty, did compute interest from the time when the taxes on the omitted property, if duly assessed, would have been payable. This interest, we think, is in the nature of a penalty, for the amount of the taxes to be paid was unliquidated until the treasurer made the computation and demanded payment. Interest was, therefore, improperly included in the amount of the recovery."

In the case of *In re* Barber, 31 Minn. 256, the Supreme Court of Minnesota enforced the principle we here contend for, in the following state of case: There a statute of 1878 provided for retroactive assessment and collection of taxes on omitted property, and the complaint there was for taxes assessed for the years 1871 and 1872. In meeting the contention that it was not within the power of the Legislature to thus retroactively assess and tax, the court there said:

"Every piece of property (not exempted) owes to the State its proportionate share of the amount necessary to be raised by taxation for the expenses of the government. Although for any cause the proportionate share for any one year of any piece of

property may not be enforced, or even ascertained, the debt remains, and it may be ascertained and enforced in any subsequent year; and the owner can not object to any particular mode adopted by the State for ascertaining such share, and enforcing payment of it unless such mode operate unequally or unjustly."

In the case of the City of Wilmington v. Cronly, 122 N. C. 383, heretofore referred to, the suit was to recover arrearages of taxes for 1875 to 1892, under an act passed in 1895, and in answer to the claim there made that the act was retroactive, contrary to an express provision of the Constitution of that State, prohibiting retrospective laws, the court there said, quoting from Railroad v. Commissioner of Alamance, 82 N. C. 259:

> "The retrospective features of the Act are not fatal to its validity. * * * No vested rights are involved. No wrong is done by the means employed to correct a common error and prevent an unjust and unintended exemption."

In State v. Railroad, 14 Lea, 62, the proceeding was under an act of the State of Tennessee, made in 1883, to assess and collect taxes for 1872, 1873 and 1874. It was there contended that there was no law in force during those years, authorizing any assessment whatever of railroad property, and that it was not within the power of the Legislature thus retroactively to assess. The court held both of these contentions untrue in point of fact, and at page 64 said:

> "It has often been decided, says Judge Cooley, that where the only defect in a tax was the want

> of previous legislation, this might be supplied retrospectively," Cooley on Taxation, 228, "and of course the Legislature may authorize retroactively any proceeding for the assessment of property for taxation which they might have authorized in advance."

In the case of Gager v. Prout, 48 Ohio St. 89, under a Constitutional provision expressly prohibiting retroactive laws, the Supreme Court of Ohio held an Act of 1886, providing for the assessment of property and the collection of taxes for previous years, with a penalty of 50 per cent. added, to be valid in so far as the listing of the property and the collection of the tax was concerned, but that the collection of the penalty should not be enforced as to years previous to 1886. It was there said, at page 108:

> "By the rule (rule of construction) a statute may be invalid in part by reason of some provision being repugnant to the Constitution and valid as to the residue, where it appears that the invalid part is an independent provision, not in its nature and connection essential to the other parts of the statute, nor so related to the general purposes of the statute as to warrant the conclusion that the Legislature would have refused to adopt it with the invalid part stricken out."

It was there held that the features providing for the penalty were not so interwoven with the features calling for taxation that the statute could be said to be one of pains or penalties, and not one of revenue.

In the case of County of Redwood v. Winona, 40 Minn. 512, heretofore cited, the Supreme Court of Minnesota held that a general provision for retrospective

assessment and taxation of property was valid in so far as its assessment and the collection of the tax was concerned, but that until the property owner was in default after the assessment and the fixing of the amount of the tax, neither penalty nor interest could be collected, and that so much of the statute as called for penalties and interest should not be applied to property omitted during the years prior to the date of the enactment of the statute.

In Henderson Railroad v. Dickenson, 17 B. Monroe, 173, it was held (we quote from the syllabus):

> "Retrospective legislation is not expressly prohibited by either the Constitution of the United States or of Kentucky, unless it impairs the obligation of a contract."

Of like kind is the case of Bank of Commonwealth v. Patton, 4 J. J. Marshal, 190; Thornton v. McGrath, 1 Duvall, 349.

In Jaehne v. People of New York, 128 U. S. 189, this court in an opinion by Mr. Chief Justice Fuller, announced the same rule which was applied by the Court of Appeals of Kentucky to the legislative act in question. In that case this court said:

> "The rule upon this subject, which we consider applicable, is that 'A legislative act may be entirely valid as to some classes of cases and clearly void as to others. A general law for the punishment of offenses, which should endeavor to reach by its retroactive operation acts before committed, as well as to prescribe a rule of conduct for the citizen in future, would be void so far as it was retrospective; but such invalidity would not affect the operation of

the law in regard to the cases which were within the legislative control.' Cooley, Const. Lim 5th ed. 215."

To the same effect are—

McElvaine v. Brush, 142 U. S. 155.
Re Medley, 134 U. S. 160.
Missouri v. Dockery, 191 U. S. 165.
Ky. Union Co. v. Commonwealth, 128 Ky. 610.
Hoke v. Commonwealth, 79 Ky. 567.
County of Redwood v. Winona, 40 Minn. 512.
Galusha v. Wendt, 114 Iowa, 597.

Conceding, for the purpose of argument (but it is not true), that prior to the Kentucky Legislative Act of 1906 the plaintiff in error and those similarly situated were not required to list their claims for taxation, it was still within the power of the State by that act to require them within a given period after the act went into effect to list their property for consideration of the State for assessment and taxation for previous years and in default to suffer a forfeiture. Such an effect given to the law would not make it a violation of the Federal Constitution prohibiting the passage by the State of *ex post facto* laws nor make it retroactive.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86.

In that case this court, in an opinion by Mr. Justice Day, in quoting from U. S v. Trans-Missouri Freight Association, 166 U. S. 290, said:

"It is said that to grant the injunction prayed for in this case is to give the statute a retroactive effect; that the contract, at the time it was entered

into, was held not prohibited or declared illegal by the statute, as it had not then been passed; and to now enjoin the doing of an act which was legal at the time it was done would be improper. We give to the law no retroactive effect. The agreement in question is a continuing one. The parties to it adopt certain machinery, and agree to certain methods for the purpose of establishing and maintaining in the future reasonable rates for transportation. Assuming such action to have been legal at the time the agreement was first entered into, the continuation of the agreement, after it had been declared to be illegal, becomes a violation of the act. The statute prohibits the continuing or entering into such an agreement for the future, and, if the agreement be continued, it then becomes a violation of the act."

That retrospective State laws, unless criminal or penal in their nature, are not within the term of the Federal Constitution prohibiting *ex post facto* laws, even though they may divest vested right, is well established by the repeated decisions of this court.

Satterlee v. Matthewson, 2 Pet. 380.
Watson v. Mercer, 8 Pet. 88.
Charles River Bridge v. Warren Bridge, 11 Pet. 420.

Speaking of retrospective laws, the Court of Appeals of Kentucky, in its opinion, delivered by Chief Justice O'Rear, in the cases here on writ of error, 127 Ky. 716, said:

"It is assumed in argument against the validity of the act that any retrospective statute is unconstitutional. But such is not the law. The Legislature may provide for retrospective assessment of prop-

> erty, and, if it has been omitted, ought to do so (Levy v. City of Louisville, 97 Ky. 394), as otherwise such property would enjoy an exemption to which it was not entitled, and thereby impose an additional and unjust burden upon other taxpayers. There is nothing in our Constitution which prohibits retrospective taxation. Nor is there in the Federal Constitution. Florida Central R. R. Co. v. Reynolds, 183 U. S. 471. The only inquiry is, has the Legislature clearly indicated its purpose to tax the property retrospectively? Durrett v. Davidson, 122 Ky. 851. Under the language of this act there can be no doubt of such purpose."

The Court of Appeals of Kentucky, in construing State laws and the State Constitution in these cases, 127 Ky. 710, held that the legislative act of 1906 did not for the first time tax the property of the plaintiff in error—that by the Constitution and the repeated decisions of the State court, the claim of the plaintiff in error was property liable to taxation and required to be listed—that the act of 1906 merely provided a procedure for enforcing the listing and taxation of this character of property. At page 710 Chief Justice O'Rear, in speaking for the court, said:

> "It is contended by appellant that the act in question is vicious, because it seeks to extort an unlawful duplicate tax upon the same land. In the petitions of appellant is this paragraph: 'Your petitioner is advised by counsel, learned in the law, and the laws of the Commonwealth of Kentucky, whenever the occupant or occupants of any part or parts of any of said tracts have paid the taxes thereon, which those under whom your petitioner claims ought to have paid or ought to pay, the person so

paying the tax shall be entitled to recover of the owner the amount of the tax so paid and interest, which shall continue a lien on the property upon which such tax was paid.' The laws of the Commonwealth referred to in the foregoing statement of the petitions are as follows: 'Any person having a lien on property upon which the owner has failed to pay the taxes, and has become delinquent, such lien holder may pay the taxes, interest and penalties thereon, and shall be subrogated to the lien of the Commonwealth, county or district therefor, and the sum so paid shall bear legal interest from the date of payment, and shall be collectible in the same manner as the original claim of the lien holder.' 'Wherever the occupant or tenant of any land, or bailee or person in possession of any personal property, shall pay the tax thereon which the owner ought to pay, the person paying the tax shall be entitled to recover of the owner the amount of the tax so paid and interest, which shall constitute a lien on the property upon which such tax was paid.' Ky. Stats., 1903, Sections 4032, 4033, continued in force by Act March 15, 1906, article 1, sections 14, 15, and Acts 1906, p. 92, c. 22.

"There is no such connection or privity between adverse claimants of land as entitles one to recover taxes voluntarily paid by him on the land, although he in fact did not own it, from another who did own it, but failed to list it and pay the taxes. That which the State taxes is the property of the claimant—not the land. The right to possess, the title or legal title of dominion, is the property which the law protects, and is that property which it taxes. If two persons claim the same land, each having a title, but undetermined which is superior, shall the State stand back until their dispute is settled before it can exact a tax from the owners? For if one of them can lawfully refuse to list his claim, which is his estate in the land, then the other could also. The State cre-

ates property—that is, the right to a thing—by protecting its use and enjoyment. It maintains police to protect its security and that of its owner, courts in which his rights may be vindicated, and the whole fabric of social government, which gives all value to every kind of property. In return, the State exacts certain personal services from the citizen, and in addition a sum at certain intervals, called a 'tax,' with which to defray the expenses of the government which he enjoys and which protects him in his rights of property. The State, then, may tax whatever is property within its jurisdiction. If one has an imperfect title to land, that is property, and it may be taxed, although another have a more perfect claim to the same land, which is also taxed as his property. That is not double taxation. There are many instances in which the same tangible thing supports several separate properties. For example, a corporate franchise is taxed; so is the property which is used in connection with it, without which the franchise would have no appreciable value. Lands owned by corporations may be taxed; that is, the corporation's dominion and right in them. Based upon the land, the corporation issued shares to its stockholders. These shares, mere intangible things, may also be taxed against the shareholders. Nor would that be double taxation, though it might be impolitic. A debt is taxable as the property of the creditor. That for which the debt was created, if property, is also taxed as the property of the debtor.

"The act of 1906 provides: 'It shall be the duty of each and every owner or claimant of land to pay all the taxes * * * and to list said land * * * for taxation.' It also provides: 'The fact that said land has been listed for taxation, or the taxes have been paid thereon by another claimant, shall not relieve against the duty herein imposed.' Laws 1906, pp. 115, 116, c. 22, art. 3 section 1. The provision existed under the General Statutes. Gen.

Stats., p. 1036, c. 92, art. 1, section 8. Double taxation is not *per se* unconstitutional. It is only when taxes are imposed twice by the same government upon the same property as against the same owner that they are inhibited, and then only by virtue of the clause in the Constitution which requires all taxation to be uniform. It is only when there is a destruction of uniformity by virtue of the so-called double taxation that is prohibited. The State is interested, not only in having its taxes paid to it, but in having them paid by the persons who ought to pay them. The fact that the State makes a claimant in possession, though not having the best title, pay taxes upon his property—that is, his claim—does not exhaust the State's power to compel any other claimant of a title to the same land to list his claim and pay taxes upon it. The statutes quoted above, and relied on by appellant, at the utmost would not give a claimant of the land who paid taxes on it a lien as against the true owner, if the latter also paid. When the Legislature requires the true owner to list and to pay taxes on his claim, it is therefore no defense under this statute that another (a stranger to the title) has listed the land and paid the taxes, and would have a right of action to recover for them if the State did not collect them from the true owner. Simpson v. Edmiston, 25 W. Va. 675."

Such has been the uniform rule in Kentucky, at least since 1821, when the case of—

Olds v. *Commonwealth,* 3 A. K. Marshall, 465,

was decided. The question presented in that case was, whether the true owner of a billiard table was excused from listing it for taxation and paying taxes upon it upon the ground and for the reason that it was claimed, listed, and taxes paid upon it, by another and adverse

claimant. The court, in its opinion quoted from hereinbefore, held that the true owner was not thus excused.

In Greene v. Biddle, 8 Wheat. 100, in speaking of the peculiar nature of these Virginia grants as property, Mr. Justice Johnson said:

> "Land they were not, and yet all the attributes of real estate were extended to them and intended by the compact to be preserved to them under the dominion of the new State."

In Elder v. Wood, 208 U. S. 226, this court, in an opinion delivered by Mr. Justice Moody, held that lands of the United States were not taxed under a statute of Colorado imposing a tax on the right to the possession of the lands for mining purposes, and the enforcement of the collection of such tax by a sale of the right of possession. In that case it is said (p. 232):

> "The construction of this statute and the conformity to it of the proceedings of the taxing officials were questions exclusively for the Supreme Court of the State, and we have no authority to review its determination of them. That court held that what was assessed was not the land on which the mining claim was located, but the claim itself; that is to say, the right of possession of the land for mining purposes. It is agreed that the Comstock lode was a 'valid subsisting mining location,' and, at the time of the assessment of the tax, Wilhelmina Gude was the owner of the undivided interest in it which is in controversy here. Such an interest from early times has been held to be property, distinct from the land itself, vendable, inheritable, and taxable. Forbes v. Gracey, 94 U. S. 762; Belk v. Meagher, 104 U. S. 279; Manual v. Wulff, 152 U.

SPOTS ON PA

S. 505; St. Louis Min. & Mill Co. v. Montana Min. Co., 171 U. S. 650; 1 Lindley, Mines, Sections 535 to 542, inclusive. The State, therefore, had the power to tax this interest in the mining claim and enforce the collection of the tax by sale."

To the same effect that the right of title or the right of possession is property, see 2 Abbott Min. Cor., Section 749.

We submit, therefore, that if the Kentucky act of 1906 retrospectively taxed the plaintiff in error's property, no Federal right was involved. Taxation cannot be retrospectively exercised where the power to tax did not exist at the time for which the taxes are retrospectively laid.

Evans v. Wagner, 170 U. S. 588.

But, where the power to tax existed, but its exercise was merely omitted, it may be retrospectively enforced.

Citizens Nat'l Bank v. Ky., 217 U. S. 443.
League v. Texas, 184 U. S. 156.
Florida Railroad v. Reynolds, 183 U. S. 471.
Watson v. Mercer, 8 Pet. 88.
B. & O. R. v. Nisbit, 10 Howard, 13.
Satterlee v. Matthewson, 2 Pet. 380.
Charles River Bridge v. Warren Bridge, 11 Pet. 420.
Carpenter v. Pa., 17 Howard, 456.
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86.
Stickney v. Kelsey, 209 U. S. 419.
Diamond v. Husband, 68 Atl. 246.
Durrett v. Davidson, 122 Ky. 851.
National Bank v. Commonwealth, 118 Ky. 51.
Botts' Exor. v. Louisville, 117 Ky. 800.

GES

In League v. Texas, 184 U. S., in an opinion delivered by Mr. Justice Brewer, this court held:

> "That a State may adopt new remedies for the collection of taxes and apply those remedies to taxes already delinquent without any violation of the Federal Constitution, is not a matter of doubt. A delinquent taxpayer has no vested right in an existing mode of collecting taxes. There is no contract between him and the State that the latter will not vary the mode of collection. * * *
>
> "Defendant further contends that interest, expenses, and costs are included in the new remedy by judicial proceedings which were not provided for by the prior statutes in reference to collector's sales. * * *
>
> "Liability for these costs and expenses can be avoided by payment of taxes; and a delinquent taxpayer—one who fails to discharge his obligations to the State, compelling it to go into court to enforce payment of the taxes due upon his land—has no ground for complaint because he is charged with the ordinary fees and expenses of a law suit.
>
> "While the matter of interest stands upon a little different basis, yet, so far as the Federal Constitution is concerned, there is nothing to prevent its collection. The statute may be retroactive, but a statute of a State is not brought into conflict with the Federal Constitution by the mere fact that it is retroactive in its operation."

In Florida Railroad v. Reynolds, 183 U. S., at 475, this court, in an opinion by Mr. Justice Brewer, said:

> "It must be remembered that 'taxes are not debts in the ordinary sense of that term;' that they are 'the enforced proportional contribution of persons and property, levied by the authority of the State for the support of the government and for all public

needs.' Cooley, Tax'n, 1st Ed., p. 13. They are obligations of the highest character, for only as they are discharged is the continued existence of government possible. They are not canceled and discharged by the failure of duty on the part of any tribunal or officer, legislative or administrative. Payment alone discharges the obligation, and until payment the State may proceed by all proper means to compel the performance of the obligation. No statutes of limitation run against the State, and it is a matter of discretion with it to determine how far into the past it will reach to compel performance of this obligation."

The syllabus is:

"There is nothing in the Federal Constitution which forbids a State to reach backward and collect taxes from certain kinds of property which were not at the time collected through lack of statutory provision therefor, or in consequence of a misunderstanding as to the law, or from neglect of administrative officials, without also making provision for collecting the taxes, for the same years, on other property.

"The requirement of 'due process of law' does not prevent a State from enacting retrospective laws, changing the method of collecting taxes, or the laws giving to the State an additional remedy for the collection of delinquent taxes. There is no contract between him and the State that the latter will not vary the mode of collection."

Section 172 of the Kentucky Constitution of 1891 provides:

"All property not exempt from taxation by this Constitution shall be assessed for taxation at its fair cash value. * * *"

Section 170 provides specifically for the exemptions with which we are not here concerned.

The first section of Article 3 of the Revenue Act of 1906 provides:

> "It shall be the duty of each and every owner or claimant of land to pay all the taxes which have been assessed and which should have been assessed against him, and those under whom he claims as the owner or claimant of said land, as of the 15th day of September, 1901, the 15th day of September, 1902, the 15th day of September, 1903, the 1st day of September, 1904, and the 1st day of September, 1905 (the dates provided by the previous general revenue acts for assessment), and if the said owner or claimant or those under whom he claims has failed to list said land, or any part thereof for taxation as of said dates or any of them, it shall be his duty to have same assessed and listed for taxation in the manner and within the time hereinafter provided. * * *"

Under the Constitution and the repeated decisions of the State court, hereinabove cited and referred to in the opinion of the Court of Appeals in 127 Ky., the property of the plaintiff in error *should have been assessed and taxed* and the statute here complained of has merely adopted a new method and procedure for compelling the plaintiff in error to do in 1907 what it failed to do during the previous years.

We therefore submit that either under this view of the case or under the contention of the plaintiff in error that the statute of 1906 for the first time subjected this property to taxation, no right of the plaintiff under the Federal Consitution was involved, and as we are here

concerned only with the Federal questions in the assignment of errors, we submit that the contention of the plaintiff in error that the legislative act of 1906 as construed and enforced against the plaintiff by the highest court of the State of Kentucky, is neither *an ex post facto* law, nor does it deny to the plaintiff the due process of law within the meaning of the Fourteenth Amendment.

III.

Equal Protection of the Law.

It is urged by the plaintiff in error that the legislative act in question as construed and enforced by the State court, denies to the plaintiff the equal protection of the laws by providing a special procedure with reference to delinquents under Article 3 of the act from delinquents under other provisions of the general law, and thereby violates the prohibition of the Fourteenth Amendment to the Federal Constitution.

In addressing itself to this contention, the Court of Appeals of Kentucky, in 127 Ky., at 696-7, said:

> "Thus we see that in 1906 the Legislature was confronted with this situation: Every evil that had existed from the beginning, threatening the stability of the land titles of a large and important section of the State, was still unalleviated; that every legislative measure adopted during the past 115 years had been unavailing; that in spite of their public duty, and of the imperative command of the law and needs of the State, these claimants refused to respond, and were beyond the reach of the law then in existence; that the reason of the failure of the previous legisla-

tion upon the subject was those constitutional obstacles which had been pointed out in various opinions of this court and of the Supreme Court of the United States; that similar conditions produced by the same cause had existed in two of our sister States; that they had gone further than Kentucky had in an attempt to relieve the situation; and that their efforts had been successful, and were without legal exception. The idea was not new to the Legislature that the duty of the Commonwealth was to protect herself from a continuation of that thrall that was paralyzing the energies of a large section of the State, disturbing its peace, and robbing the State treasury of its revenues. Thereupon, Article 3, p. 115, c. 22 of the Acts of 1906, was most deliberately adopted. The revenue laws of Kentucky, in the opinion of the previous Legislature needed radical revision. A commission was raised to study the question, to hear complaints and suggestions, and to bring in at the next session a new bill covering the entire subject. Two years were allowed for the work. The committee did as directed. The whole system of the State's revenue laws was revised, and an entirely new, complete measure introduced and enacted. Acts 1906, pp. 88-248, c. 22. Article 3, as quoted above, was in this deliberate manner proposed and adopted. There can be no doubt that the Legislature determined to outlaw these dormant titles, and thereby protect the treasury and increase the State's revenues. Nor can there be doubt that the legislative purpose was to proceed carefully, and in that manner that would satisfy the requirements of the Constitutions of this State and of the United States. The Legislature did not intend to deal tenderly with a situation that had been aggravating in its merits. It realized that sometimes sternness is justice, and further leniency injustice. The Legislature has squarely faced the problems of the situation. The court has no disposition to look at it otherwise than it is—to

pass upon the questions of law presented, grim and bare as they may be."

And again (page 700):

"It is claimed that the act is local and special, and thereby violates Section 59 of the Constitution. The only point urged in brief of counsel under this head is that 'the act could not apply at the very outside to more than twenty or twenty-five counties in Kentucky.' But that does not constitute the legislation either local or special. A statute regulating the care and use of natural gas wells might not apply in fact to more than a dozen counties in the State. Nevertheless the terms of the statute are general, and are applicable to every portion of the State where the conditions may exist, or may arise in the future. The classification of the subject, lands which have been omitted from assessment for a great many years, is a legitimate exercise of legislative discretion. It finds many counterparts in the statute respecting other classes of property, such, for example, as special provisions regarding the listing of non-residents' lands and the assessment of dealers in tobacco and liquors. The act is as general as the nature of its subject will admit. That it may not apply to every county would be because the general condition treated of did not happen to exist in that county. Nevertheless the act is not thereby made local. Nor is its subject special legislation in any legal sense."

In Southern Railroad v. Greene, 216 U. S. 400, this court, in an opinion by Mr. Justice Day, said:

"The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation."

Classification is necessary to an exercise of the taxing power and inheres in all legislative functions; and it is

only where there is no real or substantial distinction having a reasonable or just relation to the things in respect to which the classification is made that it can be said to be unequal.

We submit that in the case at bar there is no arbitrary selection of the plaintiffs in error as a subject of the legislative power; that they are made the object of a special procedure to list their property for taxation, is because they constitute a class which has successfully for more than a century escaped the taxing power of the State. The general laws applying to other classes of property were ineffectual to reach this peculiar class which, through a century of immunity, had become habitual delinquents. *To say that it was not competent for the State to provide a special procedure to tax this property is to hold they are not subject to the taxing power.* The same classification made by the Kentucky law with reference to these delinquents was made by the West Virginia law and approved and sustained as violating no Federal right in King v. Mullins, 171 U. S. 401.

In that case, at page 435, this court, speaking by Mr. Justice Harlan, said:

> "Another point made by the plaintiff in error is that the provision of the Constitution of Virginia exempting tracts of less than 1,000 acres from forfeiture is a discrimination against the owners of tracts containing 1,000 acres or more, which amounts to a denial to citizens or landowners of the latter class of the equal protection of the laws. We do not concur in this view. The evil intended to be remdied by the Constitution and laws of West Virginia was

the persistent failure of those who owned or claimed to own large tracts of lands, patented in the last century, or early in the present century, to put them on the land books, so that the extent and boundaries of such tracts could be easily ascertained by the officers charged with the duty of assessing and collecting taxes. Where the tract was a small one, the probability was that it was actually occupied by some one, and its extent of boundary could be readily ascertained for purposes of assessment and taxation. We can well understand why one policy could be properly adopted as to large tracts which the necessities of the public revenue did not require to be prescribed as to small tracts. The judiciary should be very reluctant to interfere with the taxing systems of a State, and should never do so unless that which the State attempts to do is in palpable violation of the constitutional rights of the owners of property. Under this view of our duty, we are unwilling to hold that the provision referred to is repugnant to the clause of the Fourteenth Amendment forbidding a denial of the equal protection of the laws.

"For the reasons stated, we hold that the system established by West Virginia, under which lands liable to taxation are forfeited to the State by reason of the owner not having them placed, or caused to be placed, during five consecutive years, on the proper land books for taxation, and caused himself to be charged with the taxes thereon, and under which, on petition required to be filed by the representatives of the State in the proper circuit court, such lands are sold for the benefit of the school fund, with liberty to the owner, upon due notice of the proceeding, to intervene by petition and secure a redemption of his lands from the forfeiture declared by paying the taxes and charges due upon them, is not inconsistent with the due process of law required by the Constitution of the United States or the Constitution of the State."

In Florida Railroad v. Reynolds, 183 U. S. 471, wherein was brought in question an act of the Legislature of the State of Florida, which made special provision for the back assessment of railroad property theretofore omitted, but applied to no other omitted property, and argument was made that the classification was unreasonable and the act therefore void, this court, in an opinion by Mr. Justice Brewer, at page 480, speaking of a complaint similar in principle concerning the tax laws of Florida, said:

> "If the State, as has been seen, has the power, in the first instance, to classify property for taxation, it has the same right of classification as to property which in past years has escaped taxation. We must assume that the Legislature acts according to its judgments for the best interests of the State. A wrong intent can not be imputed to it. It may have found that the railroad delinquent tax was large, and the delinquent tax on other property was small, and not worth the trouble of special provision therefor. If taxes are to be regarded as mere debts, then the effort of the State to collect from one debtor is not prejudiced by its failure to make like effort to collect from another. And if regarded in the truer light as a contribution to the support of government, then it does not lie in the mouth of one called upon to make his contribution to complain that some other person has not been coerced into a like contribution."

In Citizens Nat'l Bank v. Ky., 217 U. S. 443, a system of taxation applicable to stock of a national bank domestically held was affirmed in an opinion by Mr. Justice Lurton, although the same system was not applied to foreign-held stock.

In Soper v. Lawrence Bros. Co., 201 U. S. 359, this court, in an opinion by Mr. Justice Holmes, held that property is not taken without due process of law or in denial of the equal protection of the laws, by construing the statute of Maine, enacted in 1895, barring actions by the former owner to recover wild lands adversely held, unless commenced within twenty years or before January 1, 1900, as defeating an action begun after that date, where the defendant had held the statutory possession for the five years following the act and for fifteen years before.

In Welsh v. Swasey, 214 U. S. 91, this court, in an opinion delivered by Mr. Justice Peckham, held that the equal protection of the laws is not denied an owner of property in the residential section of Boston by the discrimination made between the commercial and residential sections of that city by the Act of 1904, limiting the height of buildings in the commercial district to 125 feet and in the residential district to from 80 to 100 feet.

In Michigan Railroad v. Powers, 201 U. S. 245, this court, in an opinion by Mr. Justice Brewer, held that nothing in the Federal Constitution prevents a State from singling out railroad and other corporate property and taxing it for State purposes in a manner and at a rate different from that applicable to other property.

In Cox v. Texas, 202 U. S. 446, this court, in an opinion by Mr. Justice Brewer, held that liquor sellers are not denied the equal protection of the laws because producers or manufacturers of domestic wines are exempted

from the tax imposed under the Texas statute of 1895, while such wines are in their hands.

In McLean v. Arkansas, 211 U. S. 539, this court, in an opinion by Mr. Justice Day, held that the exemption of coal mines, not employing ten or more men from the operation of the Arkansas statute of 1905, under which miners employed at quantity rates are prevented from contracting for wages upon the basis of screened coal instead of the weight of the coal as originally produced in the mine, does not deny equal protection of the laws.

In Thompson v. Kentucky, 209 U. S. 340, this court, in an opinion by Mr. Justice McKenna, held that due process does not assure to a taxpayer the interpretation of State legislation by the executive officers as against its interpretation by the courts, or relieve from the consequence of a misinterpretation by either, and that the equal protection of the law is not denied by the taxation of distilled spirits in bonded warehouses under a statute which makes the warehouseman liable for the tax and gives him a lien upon the property for the amount paid.

In Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, this court, in an opinion by Mr. Justice Day, held that due process of law is not denied by a law which imposes a fine of from fifty to fifteen hundred dollars per day for violation of the anti-trust laws of Texas, where it appears that only by heavy penalties can wealthy trusts be compelled to obey the law.

In Armour Packing Co. v. Lacey, 200 U. S. 226, this court, in an opinion by Chief Justice Fuller, held that the equal protection of the laws is not denied a foreign meat-

packing-house by the tax imposed on its local business under the statute of North Carolina of 1903, taxing every meat packing-house doing business in the State, although at the points where such local business is carried on, persons selling meat packing-house products, but not doing a meat packing-house business, are not subjected to the tax, or because houses packing vegetables and the like are not included in the same classification or subjected to the same tax.

In every varying condition, where the classification made is not arbitrary, but proceeds upon some reasonable basis to accomplish some reasonable result, this court has held that due process of law is not denied whether the law be enacted under the taxing power or the police power of the State.

Cook v. Marshall County, 196 U. S. 261.
Murphy v. Ramsey, 114 U. S. 15.
Thomas v. Gay, 169 U. S. 264.
Winona Land Co. v. Minn., 159 U. S. 540.
Coulter v. L. & N., 196 U. S. 599.
Board of Commissioners v. Johnson, 89 N. E. 590-597.
Gay v. Thomas, 46 Pac. 578.
Sturgis v. Carter, 114 U. S. 511.
Morell Refrig. Co. v. Commonwealth, 128 Ky. 447.
National Bank v. Commonwealth, 118 Ky. 51.
Botts' Exor. v. Louisville, 117 Ky. 798-803.
Brown Forman v. Ky. 217 U. S. 563.
Standard Oil v. Tenn., 217 U. S. 413.
Kuhn v. Fairmont Coal Co., 215 U. S. 349.
Williams v. Arkansas, 217 U. S. 79.
Laurel Hill Cemetery v. San Francisco, 216 U. S. 358.
Citizens Nat'l Bank v. Ky., 217 U. S. 443.

and numerous cases reviewed in the cases above cited.

It is customary to make special classifications with reference to criminals, making the punishment life imprisonment on a third conviction for a felony.

Brown v. Commonwealth, 100 Ky. 127.
Herndon v. Commonwealth, 105 Ky. 197.
People v. Hayes, 37 Am. St. Rep. 572 (in an elaborate note to this case, the cases in the various States are collated).

We therefore submit that the plaintiff in error belongs to a class of taxpayers who have escaped taxation for more than a century under the previous laws of the State of Kentucky; that these laws were found incapable of reaching this class of property and taxpayers, and that it was competent for the Legislature of Kentucky, therefore, to provide a special procedure by which they may be reached; that the same law and the same procedure apply equally to all embraced within the class; and that the object sought and accomplished by the act, as construed by the highest court of the State of Kentucky, results only in compelling this class of property to bear its just proportion of the public burden, and that the act neither on its face nor as construed denies to the plaintiff in error the equal protection of the laws.

NON-FEDERAL QUESTIONS.

In addition to the Federal questions assigned as errors, the plaintiffs in error complain of errors that are not Federal in their nature. Though these questions are

not reviewable upon a writ of error to a State court, yet as they are assigned and seriously urged, we shall briefly consider them. They are:

(a) That the plaintiff in error has complied with the statute of 1906 in so far as it is within its power so to do.

(b) That in a general way the statute is an act of spoliation and lawless confiscation and is revolutionary and subversive of all constitutional and orderly government.

(c) That the act is repealed on its face.

It is well established by the repeated decisions of this court that the Federal courts will follow the decisions of the State courts in construing their own laws, and that on writs of error to State courts, the scope of review is restricted to the correction of errors committed in the decision of Federal questions.

Boston Chamber of Commerce v. Boston, 217 U. S. 189.
Kuhn v. Fairmont Coal Co., 215 U. S. 349.
Citizens Nat'l Bank v. Ky., 217 U. S. 443.
Heike v. U. S., 217 U. S. 423.
Martin v. Hunter, 1 Wheat. 304.
Mathews v. Zane, 7 Wheat. 164.
Montgomery v. Hernandez, 12 Wheat. 129.
Wallace v. Parker, 6 Pet. 680.
Udell v. Davidson, 7 Howard, 769.
Pollard v. Kibbe, 14 Pet. 353.
Lytle v. Ark., 22 How. 193.

In Palmer v. McMahon, 133 U. S. 660, it was held that the Supreme Court of the United States, on a writ of error to a State court, is bound by the decision of that

court on a question of compliance with the State statute in relation to taxes and form of assessment.

It has been repeatedly held that the proper construction of State legislation is a question of local and not of Federal law, and that the decision of a State court thereon is not subject to review by the Federal Supreme Court on a writ of error.

> Great Western Tel. Co. v. Purdy, 162 U. S. 329.
> Lombard v. West Chicago Park, 181 U. S. 33.
> Harrison v. Meyer, 92 U. S. 111.
> Stryker v. Goodnow, 123 U. S. 527.

In Williams v. Eggelston, 170 U. S. 304, it was held that the decision of the highest court of a State that the State statute in no way violates the State Constitution is conclusive upon the Supreme Court of the United States on writ of error to that court, notwithstanding there was a division of opinion between the members of the State court.

In Austin v. Boston, 7 Wall. 694, it was held that where a right claimed under a law of the United States is denied by the judgment of a State court, the Supreme Court on a writ of error can only consider the statute in connection with the case before it; that it can not inquire whether in another case arising upon a different state of facts the statute may not produce results in conflict with the Federal right.

In Eastern Building Association v. Ebaugh, 185 U. S. 114, it was held that the laws of a State are matters of fact to be proved before the courts of another State, and that a finding as to such laws based upon the decisions of

the courts of that State introduced in evidence is binding on the Federal Supreme Court on writ of error for the reason that on writ of error, a question of fact is not reviewable, as held by a long line of cases.

New York v. Roberts, 171 U. S. 658.
Columbia Water Power v. Col. Electric Light, etc., Co., 172 U. S. 475.
Keokuk, etc., Bridge Co. v. Ill. 175 U. S. 626.
L. & N. v. Schmidt, 177 U. S. 240.

Again, it has been repeatedly decided by this court that an interpretation of a State statute by the highest court of a State as to the divisibility of provisions of a State law, some of which may be unconstitutional, is binding on the Supreme Court of the United States on writ of error to the State court, concerning the penalty of such legislation under the Federal Constitution.

Noble v. Mitchell, 164 U. S. 367.
Cargill Co. v. Minn., 180 U. S. 452.

The construction given by the highest State court to its own constitution is conclusive on the Federal Supreme Court in determining its conflict with the Federal Constitution on writ of error to the State court.

Manly v. Park, 187 U. S. 547.

Even where the State law has not been construed by the State court prior to the origin of the cause of action sued upon, the Federal court resolves every reasonable intendment to agree with the State courts concerning the construction of the State laws, and it is only where a con-

tract is claimed under the State law and the State courts decide against the contract that the Federal court is not bound by the construction given to the law by the highest courts of the State.

King v. Mullins, 171 U. S. 404.
Missouri v. Dockery, 191 U. S. 165.
Soper v. Lawrence Bros. Co., 201 U. S. 359.
Tampa Water Works v. Tampa, 199 U. S. 241.
Wilson v. Standefer, 184 U. S. 399.
Armour Packing Co. v. Lacey, 200 U. S. 226.
Equitable Life v. Brown, 213 U. S. 25.
Burgess v. Seligman, 107 U. S. 20.
Stanley v. Kohler, 190 U. S. 437.
Maiorano v. B. & O. R., 213 U. S. 268.
Johnson v. St. Louis, C. C. A., 5 Cir., 172 Fed. 31 (96 C. C. A. 617).
Messenger v. Anderson, C. C. A., 6 Cir., 171 Fed. 785 (96 C. C. A. 445).
Adelbert College of Western Reserve University v. Wabash R. Co., C. C. A., 6 Cir., 171 Fed. 805 (96 C. C. A. 465).
Kuhn v. Fairmont Coal Co., 215 U. S. 349.
King v. West Virginia, 216 U. S. 92.

A.

PLAINTIFF HAS NOT COMPLIED WITH THE STATUTE.

While plaintiff in error, Eastern Kentucky Coal Lands Corporation, applied to the county courts within the time allowed by the act, confessing that neither it nor its predecessors in title had ever listed its property for taxation and did request a listing of its property, it failed to describe the land to be listed "*so as to be identified*," as required by Section 2 of the act in question. From the

application it would be impossible to locate the land or to determine its value or extent, or to take the first step towards its assessment or taxation. The application was a mere nullity and was merely the equivalent of a statement that it had property which had never been listed and which should be taxed, but that it would neither tell where nor what it was. The decision of the State court upon this application involved, we submit, no Federal question, but we further submit that the reasons given by the Court of Appeals of Kentucky for the dismissal of the application and the treatment of it as a nullity are unanswerable. In the decision complained of, 127 Ky. 667, Chief Justice O'Rear, at page 718, states the facts and the conclusions of law applicable thereto, thus:

> "Finally. Did appellant comply with the statute so that the county court ought to have listed the lands? The petitions in these cases contained the same averment, of which the Pike County case is selected as a sample, as follows: 'Your petitioner claims to be an owner of the hereinbelow-described tracts of land, situated in the county of Pike, State of Kentucky, but not of the improvements thereon, nor of certain parts of each tract as hereinafter stated, to-wit.' Then follows a description of land by calls and distances, which, it may be assumed, were sufficiently explicit to have located the several boundaries. The petition sets out the dates of issue and serial numbers of the patents, and the instruments through which the petitioner derived title, namely, unrecorded deeds from Charles B. Hillhouse, and that the title of Hillhouse was derived by deeds and contracts to convey made by him with 'others claiming by inheritance, by divers mesne conveyances, from those to whom said tracts of land re-

spectively were granted by letters patent.' The petition then states that the lands had not been assessed for any of the years 1901 to 1905, both inclusive, either by the petitioner or by any one under whom it derived title, and that no part of the taxes for any of those years had been paid. But the petitions alleged that parts of each of said tracts had been listed for taxation for each of said years by others than the plaintiff and those under whom it claimed, and that taxes under this listing have been paid by strangers. The petition then continues: 'Your petitioner does not claim to be the owner of any improvements on any of said tracts of land, nor of so much of the surface of said lands as has been adversely held by others for a period sufficient to toll your petitioner's right of entry.'

"The defects of these petitions are: (1) They do not disclose the names of the owners, and therefore do not show the proper persons to be assessed. They show that appellant is only 'an owner.' Of what part, or in what proportions, and by whom the remaining portions are owned, is not shown. (2) They do not 'so describe the land proposed to be assessed' as that, in the language of the statute, 'it can be identified'—the land to be assessed in not only specific tracts, so described in their entirety as to be susceptible of accurate location, but the interest of the listing owner, if he owns less than the entire tract, must be so described as that it may be identified. (3) Some of the patent boundaries described lie only partly in the county wherein it is proposed to list it. The petitions show that fact, but do not show where, in what part of the county, the parts to be assessed do lie; nor do they show where the excluded parts which it is admitted do not belong to the petitioner lie, so that the court could with reasonable certainty and intelligence fix a valuation upon that part which is assessed. For lands which lay upon the main Big Sandy River, in Pike County, would have a much

greater cash value than if they lay across a mountain range miles away from a navigable river or a railroad. If the claimant does not own the whole tract described, he must show what portion he does own or claim. A failure to so describe exclusions that they may be identified leaves the description as indefinite as if the original tract could not be identified.

"Nor are these objections merely technical, interposed whimsically, so as to defeat the proposed listing of the land, and so as to work its forfeiture. They are each substantial, and have solid merit to support them. Only the title of the person assessed passes by a tax sale. Johnson v. McIntyre, 1 Bibb. 295. If lands are assessed in the name of the wrong persons, no title passes by the tax sale. Wheeler v. Brammel, 8 S. W. 199, 10 Ky. Law Rep. 301; Spalding v. Thompson, 30 S. W. 20, 16 Ky. Law Rep. 836. The listing of partnership property in the name of an individual member of the firm is invalid to pass the partnership property under tax sale. Furguson v. Clark, 52 S. W. 964, 21 Ky. Law Rep. 697. A tax deed for 100 acres of 600 acres was held void in Humphries v. Huffman, 33 Ohio St. 395. The description in the deed must be one that identifies the land with reasonable certainty. Cooley on Taxation, 516; Gooch v. Benge, 90 Ky. 393. In the last-named case it was held that the description in the sheriff's deed must be so accurate as to 'enable the officer selling it and those disposed to purchase to find it and ascertain the character of it by the description given.' The description in the deed and the assessment roll must agree, or the title fails to pass. Carlisle v. Cassidy, 20 Ky. Law Rep. 562, 46 S. W. 490. A sale for taxes that have been paid is void. Therefore it is of the first consequence that the assessment should be such that if the lands were sold under it, the title of the taxpayer would pass; otherwise, no one would be justified in bidding at the sale, and the State would get none of its taxes in spite of its efforts. Further-

more, if the taxpayer did not pay within the time fixed in the statute, and the State or county elected to forfeit his title, if the assessment was ineffectual, the proceeding to forfeit must fall by the way. As the non-resident may not be reached otherwise for the tax than by the proceeding *in rem*, it is competent and necessary for the State to have in the first instance such an adequate list as will satisfy every requirement of the law as to passing a valid title if a sale or forfeiture of the land should be necessary to realize the tax. Commonwealth v. Tobacco Company, 107 Ky. 1. The purpose of the Legislature was to enforce, under the extreme penalty of forfeiture for failure, such a listing of the property as would in the future prevent its escape from taxation, as it had been enabled (unable) to do in the past because of statutes so loosely drawn as that no title would pass in case of default; and as the owner was a non-resident, or might be, a penalty of a fine would be wholly inadequate to secure the listing, as, owing to his absence from the State, jurisdiction could not be obtained to assess the fine in a criminal or penal action. An assessment under the offer made by appellant would not have enabled the State to sell any particular piece of land, or any particular interest in any particular parcel, so as to pass the title of appellant and the others claiming with it. The petition was so vague and indefinite as to utterly fail to meet the requirements of the statute. It does not answer to say that the taxpayer did not know his property or its description. He is required to know it, and to furnish it, so the property may be certainly identified from it; nor is it an answer to say that it would be too expensive for him to make the necessary investigation.

"Wherefore we conclude that the county courts were right in refusing the lists, and the circuit courts' judgments so holding are each affirmed."

That the statute can be complied with is shown by the fact that other applicants have listed their property under it, and followed every provision of the act. There is nothing technical about it. An owner of land can describe it if he so desires. In fact, the application to list filed by a plaintiff in error bears evidence on its face of a studied effort on the part of those who drew it not to comply with the act for fear of the obligation that would thereby have been imposed. This is emphasized by the fact that another application to list, filed in the Pike County Court on behalf of one of the corporate owners of plaintiff in error, Eastern Kentucky Coal Lands Corporation, and prepared by counsel who also appeared on behalf of said plaintiff in error, and whose name was signed to its application, complied in every respect with the provisions of the act including a definite, accurate description of the property sought to be listed; and upon such application the property was listed and taxes thereupon paid.

In addition to the cases above cited, the following cases in Kentucky may be referred to as showing the well-settled policy of the State that the claimants of property must list their claims in order that the taxing authorities may deermine whether or not under the law they shall be assessed and taxed, and that reasonably accurate description to identify the property must be furnished in order that its value may be determined and the tax collected, because in default of the payment by the owner of the property under the settled policy of the State, the property itself is to be sold and this is an idle ceremony

passing no title unless it is sufficiently described to identify it. The sales are made by description and the judgment of sale must follow the description in the list and the sale is void unless the same property and interest is sold which is listed.

> Hager v. Citizens' National Bank, 127 Ky. 192.
> Commonwealth v. Gatliff (Ky.), 116 S. W. 263.
> Moseley v. Hamilton (Ky.), 124 S. W. 894.

and the following cases in States of similar policy:

> Holzen v. State, 122 Neb. 336.
> Chapman v. Zaeblin, 92 Pac. 188.
> People v. Minan, 90 N. E. 438; N. Y. C. A., Jan. 4, 1910.

We, therefore, submit that if this question were open to review, the decision of the State court was correct.

The plaintiff in error also contends that it has offered to pay taxes for the years in question and refers to its answers, where it offered to pay on a valuation of one dollar per acre on 88,415 acres in Floyd, and on 20,058¾ acres in Knott County, and 55,020 acres in Letcher County and on 275,236 acres in Pike County. The answer to this is that under the Constitution of Kentucky taxes are not subject to compromise or commutation. If owing, they must be paid to the last farthing, and if not owing not one cent can be collected. The mandate of the Constitution, Section 172, is:

> "All property not exempted from taxation by this Constitution shall be assessed for taxation at its fair cash value * * *."

And Section 174:

> "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property."

Section 52:

> "The General Assembly shall have no power to release, extinguish or authorize the releasing or extinguishing, in whole or in part, the indebtedness or liability of any corporation or individual to this Commonwealth, or to any county or municipality thereof."

Under the settled construction given to these provisions by the highest court of the State, it is not within the power, either of the citizen or the Legislature to compromise or commute a tax claim.

City of Louisville v. Louisville Railway, 111 Ky. 1.
Commonwealth v. Tilton, 111 Ky. 341.
Covington & Cin. Bridge Co. v. Davidson (Ky.), 102 S. W. 339.
Levi v. City of Louisville, 97 Ky. 394.
Schuster v. City of Louisville, 124 Ky. 189.
Holzhauer v. City of Newport, 94 Ky. 396.

The offer of the plaintiff in error was a mere tender of a compromise both as to the quantity and value of its land. It was an idle ceremony prohibited by the Constitution and laws of the State, and can not find favor on this writ of error. It was neither a compliance with the statute nor an avoidance of it. The forfeiture in all the

cases was for a failure to list, as well as failure to pay, and the forfeiture had occurred before such offer had been made.

B.

The Statute is Not an Act of Spoliation Nor a Lawless Confiscation.

In the last assignment of errors, the plaintiff, Eastern Kentucky Coal Lands Corporation, states that Article 3 of the act in question is an act of spoliation and lawless confiscation, and is revolutionary and subversive of all constitutional and orderly government.

We submit that this is mere sound and fury, signifying nothing. Unless it was a spoliation or confiscation within the Federal rights complained to have been violated, or was subversive of some constitutional right guaranteed by the Federal Constitution, the complaint is not reviewable here, nor is it reviewable in any government where judicial power has not the right of veto on the legislative power.

In response to this general contention, the State court in the cases here on writ of error, 127 Ky. 717, through Chief Justice O'Rear, said:

> "There are a number of other objections made to the statute by appellant, all of which may be grouped under the general complaint that it is harsh, oppressive, and unjust. Were these objections well grounded, they would afford no basis for relief at the hands of the court. The policy of the Legislature may be looked into by the courts for the pur-

pose only of interpreting statutes. If, then, they are found to be within the power of the Legislature to enact, the business of the court is ended. That the Legislature saw proper to enact a harsher remedy than it might have done; that it allowed the minimum of grace to the taxpayer; that it imposed most onerous penalties for his defaults; that it imposed even greater penalties than it does as against other classes whose fault may be no greater; that it does not even excuse infants, or married women, or persons laboring under disability, when the general policy of legislation is to deal more indulgently with those classes —are all considerations of expediency which appeal to the good sense and the conscience of the legislators. It is not tolerable in our form of government, with its distinct separation of powers, that acts of the legislative branch should stand or fall according as they appealed to the approval of the judiciary; else one branch of government, and that the most representative of the people, would be destroyed, or at least completely subverted to the judges. We do not say that this act is to be regarded, in the light of the history of its enactment and the abuses it was intended to remedy, as falling within the category described. There is abundant basis for the act, in which it will appear, not only as reasonable, but as highly politic. All that we do mean to say is that tested by precedent and principle, we are unable to find that it violates any provision of the Constitution of the United States or of this State, or in any wise transcends the power of the legislative department of the State government.

The statute here complained of is in its essential features a transcript of the law and procedure adopted by the State of West Virginia to reach a like class of property and to accomplish a like purpose, which has been approved as being neither a spoliation nor confiscation of

property, nor revolutionary in its character, by the decision of this court in

King v. Mullins, 171 U. S. 404.
King v. West Virginia, 216 U. S. 92.

It is again contended that the act is one of spoliation and general worthlessness within the principle of the—

Loan Association v. Topeka, 20 Wall. 665,

because of that feature of the act, which, upon the forfeiture of the title not listed, grants it to the occupant and settler in possession of the land under claim of title and who has listed his property and paid his tax. This feature of the act is copied from the laws of West Virginia, approved in

King v. Mullins, 171 U. S. 404.
King v. West Virginia, 216 U. S. 92.

In responding to this contention, the Court of Appeals of Kentucky, by Chief Justice O'Rear, in these cases in 127 Ky., at page 701, said:

> "It is claimed that the act violates Section 171 of the Constitution, which requires that taxes shall be levied for public purposes only. The grounds of this objection are (1) that the provision for investing the occupying claimant with the forfeited title shows that he is the intended recipient of the tax; and (2) that the provisions for the sale of the other forfeited lands, and the payment of some part of the proceeds to the officers who represent the State in the prosecutions, is also a provision for their private purposes. Counsel confuse the tax levied upon the

lands and the disposition of the lands by the State after they shall have become forfeited. There is no pretense, and there can be no ground for any, that the act provides any other use of the taxes that may be derived from assessments under the act than is made of all other taxes imposed on all other property of the State and its counties. But if the assessments are not made because of the contumacy of the property holder or claimant, and thereby a forfeiture of his title results, then it is not material to him what becomes of the title which has been vested in the State. There is nothing in the Constitution which prohibits the State's conferring the title upon whom it pleases, and of disposing of it in any manner its Legislature may elect to do. The forfeiture is not a tax. Nor is it the equivalent. It is a penalty imposed for a violation of a statute. Like other penalties, it is the subject of legislative control and disposal, without regard to the previous title or ownership of the convicted violator of the law."

This policy as outlined in the act is the well-settled policy of all civilized government.

In Hawkins v. Barney, 5 Pet. 457, at 466, this court said:

> "* * * No class of laws is more universally sanctioned by the practice of nations and the consent of mankind than the laws which give peace and confidence to the actual possessor and the tiller of the soil."

It is further contended by the plaintiff in error that the act is revolutionary and subversive of all constitutional and orderly government because it makes no exception in its procedure concerning lunatics, idiots, infants, and married women. The answer to this is that the plain-

tiff in error is not an infant or a married woman and does not plead idiocy or lunacy, and therefore whatever operation or effect the act may have or may not have with reference to these subjects it is not a matter of which the plaintiff in error can complain or take advantage.

Acts making no exception with reference to these subjects have been frequently made and repeatedly approved.

Vance v. Vance, 108 U. S. 514.
Jackson v. Lamphire, 3 Pet. 280.
Schauble v. Schulz, 137 Fed. 389.
Griffin v. McKenzie, 7 Ga. 163.
Lewis v. Hardin, 5 B. Mon. 564.
Lawrence v. Louisville, 96 Ky. 595.
Fish v. Bennett, 56 S. W. 813.
Red River Bank v. Craig, 181 U. S. 548.
Citizens Nat. Bk. v. Ky., 217 U. S. 443.
Standard Oil v. Tenn., 217 U. S. 413.
Heike v. U. S., 217 U. S. 423.
New York v. Reardon, 204 U. S. 152.

C.

THE ACT IS NOT REPEALED.

The contention that the act stands repealed on its face by a subsequent article in the same act, because of apparent conflict is not a Federal question, but is solely a question for the local courts. The decision of the State court that the act is not repealed but is in force deprives the plaintiff in error of no Federal right.

CONCLUSION.

The most of error in case No. 47 must be dismissed under the rule laid down in Heike v. U. S., 217 U. S. 423, as the judgment deprives the plaintiff of neither right nor property.

Upon the whole case, we therefore submit that the State court properly construed the State law, and that under the law as construed no right of the plaintiff in error under the Federal Constitution is infringed, and we therefore respectfully submit that the judgment in these actions should be affirmed.

JAMES BREATHITT,
Atty. Gen. of the Com. of Ky.

J. W. M. STEWART,
JOHN F. HAGER,
DAVID W. BAIRD,
Counsel for Defendants in Error.

Z. T. VINSON,
JOHN H. HOLT,
J. H. JEFFRIES,
AARON KOHN,
Of Counsel.